CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **MAY 31, 1995** **NO. 22**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 95–43)

RETRACTION OF REVOCATION NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The following Customs broker license number was erroneously included in a list of revoked Customs brokers licenses in the Friday, April 28, 1995, Federal Register, Vol. 60, No 82.

Customs broker	*License No.*
Regina M. Farnin	11771

License 11771, issued in the Los Angeles Customs district, remains a valid license.

Dated: May 16, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register May 22, 1995, (60 FR 27149)]

(T.D. 95–44)

RETRACTION OF REVOCATION NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The following Customs broker license number was erroneously included in a list of revoked Customs brokers licenses in the Monday, March 27, 1995, Federal Register, Vol. 60, No 58.

Customs broker	*License No.*
Tory Erickson	12605

License 12605, issued in the Los Angeles Customs district, remains a valid license.

Dated: May 16, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register May 22, 1995 (60 FR 27149)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, May 17, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A GLASS FLOWER POT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a glass flower pot. Notice of the proposed revocation was published April 12, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 31, 1995.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 12, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 15, proposing to revoke New York Ruling Let-

ter (NYRL) 896081, dated April 11, 1994, which classified a "flower pot" shaped frosted glass article under subheading 7013.99.50, Harmonized Tariff Schedule of the United States (HTSUS), as a glass decorative article. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested Parties, that Customs is revoking NYRL 896081 to reflect the proper classification of the frosted glass article under subheading 9405.50.40, HTSUS, as a candle holder. Headquarters Ruling Letter 957127 revoking NYRL 896081, is set forth as the attachment to this document. Publication of ruling decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

Dated: May 16, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 1995.

CLA–2 R:C:M 957127 MMC
Category: Classification
Tariff No. 9405.50.40

MR. JOHN M. MOLSBERRY
ROBERT E. LANDWEER & CO., INC.
CUSTOMHOUSE BROKERS
911 Western Avenue, Suite 208
Seattle, WA 98104

Re: NYRL 896081 revoked glass candle holders, flower pots; principal use; Additional U.S. Rule of Interpretation 1(a); votive, HRLs 956108, 088123, 953016, 088742, 950245, 950426, 089054; non-electrical lamps and lighting fittings; EN 94.05; candlesticks.

DEAR MR. MOLSBERRY:

This is in reference to your letters of July 5, and August 25, 1994, to Customs in New York, on behalf of Design Imports India, requesting reconsideration of New York Ruling Letter (NYRL) 896081 dated April 11, 1994, in which you were advised of the classification of a "flower pot" shaped frosted glass article under the Harmonized Tariff Schedule of the United States (HTSUS). Samples were provided.

In NYRL 896081 you were advised that the subject articles were classified under subheading 7013.99.50, HTSUS, which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * other glassware * * * other * * * other * * * valued over $0.30 but not over $3 each. You believe that they could be considered votive candles, classifiable under sub-

heading 7013.99.35, HTSUS, or, in the alternative, under subheading 9405.50.40, HTSUS, as non-electric lamps and lighting fittings.

Pursuant to section 625(c)(1) Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NYRL 896081 was published April 12, 1995, In the CUSTOMS BULLETIN, Volume 29, Number 15.

Facts:

The articles in question are described as "flower pot vase" candle holders. The samples are made of thin frosted glass and measure approximately 3½" and 2½" high and 2½" in diameter. They are imported packed 6 to a master carton. Colors are unique to each carton.

Issue:

Are the "flower pot vase" articles classifiable as candle holders under subheading 9405.50,40, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires. The competing subheadings under consideration are as follows:

7013.99.35	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * Other glassware * * * Other * * * Other * * * Votive-candleholders.
7013.99.50	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * Other glassware * * * Other * * * Other * * * Valued over $0.30 but not over $3 each.
9405.50.40	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included * * * Non-electrical lamps and lighting fittings * * * Other * * * Other.

Both subheading 7013.99.35 and 7013.99.50, HTSUS, are use provisions. There are two principal types of classification by use:

(1) according to the actual use of the imported article; and
(2) according to the use of the class or kind of goods to which the imported article belongs,

Use according to the class or kind of goods to which the imported article belongs is more prevalent in the tariff schedule. A few tariff provisions expressly state that classification is based on the use of the class or kind of goods to which the imported article belongs. However, in most instances, this type of classification is inferred from the language used in a particular provision. Because both subheadings contain the language "of the kind" and "used for", classification of goods under them are determined by the use of the class or kind of article to which the imported merchandise belongs.

If an article is classifiable according to the use other class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that: [i]n the absence of special language or context which otherwise requires— (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In other words, the article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual

tariff provisions. However, the U.S. Court of International Trade (CIT) has provided factors, which are indicative but not conclusive, to apply when determining whether particular merchandise falls within a class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc. v. United States*, USITR, 16 CIT 483, (June 24, 1992) (hereinafter *Kraft); (G. Heilman Brewing Co. v. United States*, USITR, 14 CIT 614 (Sept. 6, 1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979.

Because both subheadings 7013.99.35 and 7013.99.50, HTSUS, are use provisions, Additional U.S. Rule of Interpretation 1 (a), HTSUS, applies, This necessitates the application of the *Kraft* characteristics to the subject glassware. Application of the characteristics will determine to which class or kind the article belongs; indoor decoration or candle holders. Customs is of the opinion that the physical characteristics of the subject article, as well as the manner in which it is used, prevents it from being described by either subheading 7013.99.35 or 7013.99.50, HTSUS.

We are of the opinion that the subject articles are not principally used as the class or kind of merchandise, namely flower pots for indoor decoration, contemplated by subheading 7013 99 50, HTSUS. Flower pots necessarily have drainage holes either in their bottoms or on their sides. These articles do not. Additionally, their small size and frosted nature is consistent with a candle holder's purpose. Frosted glass will defuse the light from a flame, creating light which appears to have a "softer glow". Furthermore, the samples appear to be made of thin glass, which indicates use as a flower pot may not have been contemplated.

Subheading 7013.99.35, HTSUS, provides for glass votive-candle holders. We have held that the tariff definition of a glass votive-candle holder is a glass candle holder chiefly used in churches, where the candles are burned for devotional purposes. *See*, Headquarters Ruling Letter (HRL) 088123 dated February 25, 1991. HRL 088742 dated April 22, 1991, and HRL 950245 dated December 10, 1991. Additionally, we have held that votive-candle holders are generally of two types, large glasses or "sanctuary lamps" which contain candles that burn for about a week and small glasses which hold candles that bum for a few hours. *See*, HRL 950426 dated June 19, 1992. No evidence has been provided to indicate that the subject article is principally used in a church or for devotional purposes. Additionally, the subject receptacle is not a sanctuary lamp or a candle holder described in HRL 950426. Moreover, the subject article does not have any physical characteristics (e.g.; screened religious scenes) consistent with a votive-candle holder. Therefore, classification under subheading 7013.99.35, HTSUS, is precluded.

Subheading 9405.50.40, HTSUS, provides for non-electrical lamps and lighting fittings. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be consulted. The Explanatory Notes (EN), although not dispositive, or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg, 35127, 35128, (August 23, 1989), EN 94.05 (pg. 1581), states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. In addition, EN 94.05(I)(6) states that this heading covers "* * * in particular candelabra, candlesticks, and candle brackets."

We are of the opinion that the terms "candlestick", "candlestick holder", and "candle holder" are interchangeable. Candle holder has been defined as a candlestick, *Webster's II New Riverside University Dictionary*, pg. 224 (1st ed. 1984)) and as a holder for a candle; candlestick, *The Random House Dictionary of the English Language*, pg. 216 (1st Ed. 1983). Candlestick has been defined as a utensil for supporting a candle, whether elaborately made or in the common form of a saucer with a socket in the center, *Webster's New International Dictionary*, pg. 390 (2d ed. 1939). Reference to lexicographic authorities is proper when determining the meaning of a tariff term. *Hasbro Industries, Inc. v. United States*, 703 F. Supp 941 (CIT 1988) *aff'd*. 879 F.2d 838 (1989); *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

We have previously held that empty glass candle holders are classified under subheading 9405,50.40, HTSUS, as non-electrical lamps and light fittings. *See*, HRL 953016 dated April 27, 1993, HRL 088742 dated April 22, 1991, and HRL 089054 dated August 2, 1991, which classified glass candle holders as non-electrical lamps and light fittings tinder subheading 9405.50.40, HTSUS, pursuant to EN 94.05.

Based on the above definitions and rulings, we find that the subject articles are, in fact, candlesticks as the term is used in the ENs. They are principally used in the United States as support for a candle. They are not elaborate, but are of a simple form. Therefore, the articles are properly classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings. For the reasons set forth in this ruling, NYRL 896081 is revoked.

Holding:

The candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings, which is currently subject to the Column 1 duty rate of 7.3 percent *ad valorem*.

NYRL 896081 is revoked. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication on of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177. 1 0(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION AND MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF FOOT FILES

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of revocation and modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking and modifying two ruling letters pertaining to the tariff classification of foot files. Notice of the proposed revocation was published April 12, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 15.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 31, 1995.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, Office of Regulations and Rulings (202) 482–7063 or 7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 12, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 20, Number 15, proposing to revoke and modify two ruling letters pertaining to the tariff classification of foot files. Comments were invited on the correctness of the proposed rulings.

New York (NY) 880199 dated December 3, 1992, issued by the Area Director, New York Seaport, classified the "Glorious Foot File" under

subheading 6804.30.00, HTSUS, as hand sharpening or polishing stones. District Director (DD) 889232 dated September 1, 1993, issued by the Area Director, JFK Airport, classified a foot file from Sweden under subheading 6805.30.50, HTSUS, as natural or artificial abrasive powder or grain, on a base of other materials.

The only comment received in response to this notice was from the importer of these articles. The comment contained further information as to the construction of the foot files at issue. That information has been incorporated into the rulings at issue.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(C)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 889232 to reflect the proper classification of the foot file under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only and revoking NY 880199 to reflect the proper classification of foot file under subheading 6805.30.50, HTSUS, as other natural or artificial abrasives powder or grain, on a base of other materials. Articles classified under subheading 6805.20.00, HTSUS, are dutiable at the Column one rate of 2% *ad valorem*, and articles classified under subheading 6805.30.50, HTSUS, enter the U.S. duty free. HRL 957398 modifying DD 889232 is set forth in Attachment A, and HRL 957756 revoking NY 880199 is set forth in Attachment B to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: May 16, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 1995.

CLA–2 R:C:M 957398 KCC
Category: Classification
Tariff No. 6805.20.00

MR. STEVEN WAZLAVEK
MBODI INTERNATIONAL INC.
2520 Fast Piedmont Road, Suite F–122
Marietta, GA 30062

Re: DD 889232 modified; foot file; 6805.30.50; on a base of paper or paperboard only; EN 68.05; base; HRL 951607, 955223 and 955575.

DEAR MR. WAZLAVEK:

This is in regards to District Director (DD) 889232 issued to you on September 1, 1993, by the Area Director, JFK Airport, which classified a foot file from Sweden under subheading 6805.30.50, Harmonized Tariff Schedule of the United States (HTSUS), as natural or artificial abrasive powder or grain, on a base of other materials. We have reviewed that ruling and are of the opinion that classification under subheading 6805.30.50, HTSUS, is incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed modification of DD 889232 was published on April 12, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 15. Information submitted in your letter dated April 10, 1995, in response to the proposed modification was taken into consideration in rendering this decision.

Facts:

The foot file was described in DD 889232 as follows:

> The sample consists of a flat plastic handle which extends outward to form a base for an abrasive sandpaper. Both sides are covered with this abrasive paper. You state in your letter that these items are principally used to smooth and soften rough or hardened skin.

In a letter dated April 10, 1995, you provided a sample of the foot file at issue and stated that standard abrasive paper is glued to a plastic body to manufacture the foot file.

Issue:

Is the foot file classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only, or under subheading 6805.30.50, HTSUS, as natural or artificial abrasive powder or grain, on a base of other materials?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The competing subheadings are as follows:

6805	Natural or artificial abrasive powder or grains, on a base of textile material, of paper, of paperboard or of other materials, whether or not cut to shape or sewn or otherwise made up * * *.
6805.20.00	On a base of paper or paperboard only.
6805.30.50	On a base of other materials * * * Other

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See, T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 68.05 (pg. 901) for natural or artificial abrasive powder or grain states, in pertinent part, that:

> This heading covers textile material, paper, paperboard, vulcanised fibre, leather or other materials, in rolls or cut to shape (sheets, bands, strips, discs, segments, etc.), or

in threads or cords, on to which crushed natural or artificial abrasives have been coated, usually by means of glue or plastics. The heading also covers similar products of nonwovens, in which abrasives are uniformly dispersed throughout the mass and fixed on to textile fibres by the binding substance. The abrasives used include emery, corundum, silicon carbide, garnet, pumice, flint, quartz, sand and glass powder. The bands, discs, etc., may be sewn, stapled, glued or otherwise made up. * * *

The subject foot file consists of paper coated with abrasive material which makes abrasive sandpaper. This abrasive sandpaper is then placed over both sides of a plastic handle for use. In this case, the actual base for the abrasive material is the paper. The secondary base, *i.e.*, the plastic handle, is not the base we examine for tariff classification purposes. EN 68.05 states that abrasive coated material "may be sewn, stapled, glued or otherwise made up * * *." *See*, Headquarters, Ruling Letter (HRL) 951607 dated July 13, 1992, and HRL 955223 dated December 8, 1993 (modified in HRL 955575 dated December 22, 1993). In this case, the abrasive material, *i.e.*, abrasive sandpaper, is made up onto the plastic handle. Therefore, we are of the opinion that the foot file is classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only.

Holding:

The foot file is classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only. The corresponding duty rate for articles classified under this provision is 2 percent *ad valorem*.

DD 889232 is modified as set forth in this ruling. In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1))

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 1995.

CLA–2 R:C:M 957756 KCC
Category: Classification
Tariff No. 6805.30.50

MR. STEVEN WAZLAVEK
MBODI INTERNATIONAL INC.
2520 East Piedmont Road, Suite F–122
Marrietta, GA 30062

Re: NY 880199 revoked foot file; 6804.30.00; hand sharpening or polishing stones; EN 68.04; base; EN 68.05; HRL 955223, 955575 and 951607.

DEAR MR. WAZLAVEK:

This is in regards to New York (NY) 880199 issued to you on December 3, 1992, by the Area Director, New York Seaport, which classified the "Glorious Foot File" from Sweden under subheading 6804.30.00, Harmonized Tariff Schedule of the United States (HTSUS), as hand sharpening or polishing stones. We have reviewed that ruling and are of the opinion that classification tinder subheading 6804.30.00, HTSUS, is incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NY 880199 was published on April 12, 1995, in the CUSTOMS BULLETIN, Vol-

ume 29, Number 15. Information submitted in your letter dated April 10, 1995, in response to the proposed revocation was taken into consideration in rendering this decision.

Facts:

In NY 880199 the foot file was described as follows:

> You have submitted a sample, the "Glorious Foot File," which appears to be a piece of plastic which has an oval shape at one end and a handle at the other end. The oval portion is concave on one side and convex on the other. Both sides of the oval are coated with abrasive, You have stated that the principal use of this item is to smooth and soften rough skin.

In a letter dated April 10, 1995, you provided a sample of the foot file and stated that the label "Glorious Foot File" was incorrect. You described the foot file as a "black foot file with curve." You state that "abrasive is blasted into plastic" and that no glue is used in the manufacturing operation. Additionally, you note that the foot file is from Denmark, not Sweden.

Issue:

Is the "Glorious Foot File" classified under subheading 6804.30.00, HTSUS, as hand sharpening or polishing stones, or under heading 6805.30.50, HTSUS, as other natural or artificial abrasive powder or grain, on a base of other materials?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The competing subheadings are as follows:

6804.30.00	Millstones, grindstones, grinding wheels and the like, without frameworks, for grinding, sharpening, polishing, trueing or cutting, hand sharpening or polishing stones, and parts thereof of natural stone, of agglomerated natural or artificial abrasives, or of ceramics, with or without parts of other materials * * * Hand sharpening or polishing stones.
6805.30.50	Natural or artificial abrasive powder or grains, on a base of textile material, of paper, of paperboard or of other materials, whether or not cut to shape or sewn or otherwise made up * * * On a base of other materials * * * Other.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See, T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 68.04 (pgs. 899–900) states, in pertinent part, that:

> (3) **Grinding wheels, heads, discs, points, etc.**, as used on machine-tools, electromechanical or pneumatic hand tools, for the trimming, polishing, sharpening, trueing or sometimes for the cutting of metals, stone, glass, plastics, ceramics, rubber, leather, mother of pearl, ivory, etc. * * *
>
> The heading covers such tools not only when they are predominantly of abrasive materials, but also when they consist * * * of a centre or core of rigid material (metal, wood, plastics, cork, etc.) on to which compact layers of agglomerated abrasive have been permanently bonded * * *.
>
> Agglomerated grinding wheels, etc., are made by mixing ground abrasive or stone with binders such as ceramic materials (for example, powdered clay or kaolin, sometimes with added felspar), sodium silicate, cement (especially magnesian cement) or less rigid cementing materials (such as rubber, shellac or plastics). Textile fibres such as cotton, nylon or flax are sometimes incorporated in the mixtures. The mixtures are moulded to shape, dried, and then heated (if necessary to the stage of vitrification in the case of ceramic binders) or cured (in the case of the rubber, plastics, etc., binders). The articles are then trimmed to size and shape * * *
>
> The heading **does not include:** * * *
>
> (b) Natural or artificial abrasive powder or grain coated on to textile material, paper, paperboard or other materials **(heading 68.05)**, whether or not the textile material, paper, etc., is subsequently glued on to supports such as discs or strips of wood (buff-sticks for use in the clock and watch industry, mechanical engineering, etc.).

EN 68.05 (pg. 901) for natural or artificial abrasive powder or grain states, in pertinent part, that:

> This heading covers textile material, paper, paperboard, vulcanised fibre, leather or other materials, in rolls or cut to shape (sheets, bands, strips, discs, segments, etc.), or in threads or cords, on to which crushed natural or artificial abrasives have been coated, usually by means of glue or plastics. The heading also covers similar products of nonwovens, in which abrasives are uniformly dispersed throughout the mass and fixed on to textile fibres by the binding substance. The abrasives used include emery, corundum, silicon carbide, garnet, pumice, flint, quartz, sand and glass powder. The bands, discs, etc., may be sewn, stapled, glued or otherwise made up; * * * But the heading **excludes** grinding wheels composed of a rigid support (e.g., of paperboard, wood, metal) fitted with a compact agglomerated layer, rather than powder or grain, of abrasive, and similarly constituted hand tools **(heading 68.04).**

It is our opinion that the foot file is provided for under subheading, 6805.30.50, HTSUS. EN 68.05 specifically describes the foot file at issue. The foot file consists of a base coated with abrasive material via a blasting operation. Based on the additional information and sample submitted, the actual base is composed of plastic. Therefore, the foot file is classified under subheading 6805.30.50, HTSUS, as other natural or artificial abrasive powder or gram, on a base of other materials.

The foot file is not provided for under subheading 6804.30.00, HTSUS. EN 68.04 states that heading 6804, HTSUS, covers actual agglomerated material which has been molded to shape and heated or cured. As previously stated, the material at issue is plastic coated via a blasting operation with abrasive material. The foot file is not of the class or kind of hand sharpening or polishing stones classifiable under subheading 6804.30.00, HTSUS

Holding:

Since the foot file is composed of abrasive material coated onto a plastic base, it is classified under subheading 6805.30.50, HTSUS, as other natural or artificial abrasive powder or grain, on a base of other materials. Articles classified under this tariff provision enter the US. duty free.

NY 880199 is revoked as directed above. In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF CUSTOMS DECISION RELATING TO TARIFF CLASSIFICATION OF OPTO SENSOR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification decision.

SUMMARY: Pursuant Lo section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a decision pertaining to the tariff classification of an opto sensors Notice of the proposed revocation was published April 5, 1991), in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 31, 1995.

FOR FURTHER INFORMATION CONTACT: David W. Spence, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 5, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 14, proposing to revoke Headquarters Letter (HQ) 953561, issued on April 15, 1993, which held that an opto sensor, comprised of a light emitting diode (LED) source and phototransistor sensor and responsible for shutting down a printing machine when the machine is out of paper, was classifiable under subheading 8530.50.00, HTSUS (the 1993 precursor to 1995 subheading 8530.50.80, HTSUS), which provides for: "[e]lectrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V: [o]ther switches." Subheading 8536.50.80, HTSUS (1995), provides for: "* * *: [o]ther switches: [o]ther." No comments were received pertaining to this issue.

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this novice advises interested parties that Customs is revoking HQ 953561 to reflect the proper classification of the opto sensor under subheading 8541.40.80, HTSUS, which provides for: "[p]hotosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made tip into panels; light-emitting diodes: [o]ther: [o]ptical coupled isolators."

HQ 957646, revoking HQ 953561, is set forth as the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

Dated: May 15, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director
Commercial Rulings Division)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 15, 1995.
CLA–2 CO:R:C:M 957646 DWS
Category: Classification
Tariff No. 8541.40.80

MS. MARLEA MERICKEL
HEWLETT PACKARD CO.
1000 N.E. Circle Boulevard
Corvallis, OR 97330

Re: Reconsideration of HQ 953561; *San Francisco Newspaper Printing Co. v. U.S.;* Opto Sensor; Optical Coupled Sensor; Explanatory Notes 85.41(BI) and (C); HQ 088341; Chapter 85, Note 5; 8536.50.80.

DEAR MS. MERICKEL:

This is in reference to HQ 953561, dated April 15, 1993, issued to the District Director of Customs, Seattle, Washington, with regard to Protest 3001–93–100077, filed by you on January 28, 1993, concerning the classification of an opto sensor under the Harmonized Tariff Schedule of the United States (HTSUS). In the course of ruling on similar merchandise, we have determined that the holding in HQ 953561 is incorrect.

HQ 953561 is a decision on a specific protest. A protest is designed to handle entries of merchandise which have entered the U.S. and been liquidated by Customs. A final determination of a protest, pursuant to Part 174, Customs Regulations (19 CFR 174), cannot be modified or revoked as it is applicable only to the merchandise which was the subject of the entry protested. Furthermore, Customs lost jurisdiction over the protested entries in HQ 953561 when notice of denial of the protest was received by the protestant. *See, San Francisco Newspaper Printing Co. v. U.S.*, 9 CIT 517, 620 F. Supp. 738 (1935).

However, Customs can modify or revoke a protest review decision to change the legal principles set forth in the decision. Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), 60 days after the date of issuance, Customs may propose a modification or revocation of a prior interpretive ruling or decision by publication and solicitation of comments in the CUSTOMS BULLETIN. This revocation will not affect the entries which were the subject of Protest 3001–93–100077, but will be applicable to any unliquidated entries or future importations of similar merchandise 60 days after publication of the notice of revocation in the CUSTOMS BULLETIN. Notice of the proposed revocation of HQ 953561 was published April 5, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 14.

Facts:

The merchandise consists of an opto sensor (model no. 1990–1142) for use in a printing machine. The sensor, incorporating a semiconductor, is comprised of a light emitting diode (LED) source, emitting an infra-red beam, and phototransistor sensor. When the printing machine is out of paper, the infra-red beam is interrupted, breaking the electrical circuit and shutting down the printing machine.

The subheadings under consideration are as follows:

8536.50.80: [e]lectrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V: [o]ther switches: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 4.8 percent *ad valorem*.

8541.40.80: * * *: photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes: [o]ther: [o]ptical coupled isolators.

Goods classifiable under this provision receive duty-free treatment.

Issue:

Whether the opto sensor is classifiable under subheading 8536.50.80, HTSUS, as other electrical apparatus for switching electrical circuits, or under subheading 8541.40.80, HTSUS, as an optical coupled isolator.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

Based upon the information before us, in HQ 953561, we held that the opto sensor was classifiable under subheading 8536.50.00, HTSUS (the precursor to subheading 8536.50.80, HTSUS), as other electrical apparatus for switching electrical circuits. It was then our position that the opto sensor was precluded from classification under heading 8541, HTSUS, as that provision did not describe the merchandise.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, Explanatory Notes 85.41(B) and (C) (pp. 1398–1399) states that:

> **(B) PHOTOSENSITIVE SEMICONDUCTOR DEVICES**
>
> This group comprises photosensitive semiconductor devices in which the action of visible rays, infra-red rays or ultraviolet rays causes variations in resistivity or generates an electromotive force, by the internal photoelectric effect * * *
>
> The main types of photosensitive semiconductor devices are:
>
> (1) xxx
>
> (2) **Photovoltaic cells,** which convert right directly into electrical energy without the need for an external source of current. Photovoltaic cells based on selenium are used mainly in luxmeters and exposure meters. Those based on silicon have a higher output and are used, in particular, in control and regulating equipment, for detecting light impulses, in communication systems using fibre optics, etc.
>
> Special categories of photovoltaic cells are:
>
> (i) xxx
>
> (ii) **Photodiodes** (germanium, silicon, etc.), characterised by a variation in resistivity where light rays strike their p n junction. They are used in automatic data processing (reading of punched cards and tapes, data storage), as photocathodes in certain electronic tubes, in radiation pyrometers, etc. **Phototransistors** and **photothyristors** belong to this category of photoelectric receivers * * *
>
> (iii) **Photocouples** and **photorelays** consisting of electroluminescent diodes combined with photodiodes, phototransistors or photothyristors.
>
> Photosensitive semiconductor devices fall in this heading whether presented mounted (i.e., with their terminals or leads), packaged or unmounted.
>
> **(C) LIGHT EMITTING DIODES**
>
> **Light emitting diodes,** or **electroluminescent diodes,** (based, *inter alia*, on gallium arsenide or gallium phosphide) are devices which convert electric energy into visible, infra-red or ultra-violet rays. They are used, e.g., for displaying or transmitting data in control systems.

In HQ 088341, dated February 26, 1991, we held that photosensors, similar to the subject merchandise, were classifiable under subheading 8541.40.80, HTSUS. In that ruling, we stated that:

> [t]he photosensor at issue consists of a LED and phototransistor combined together as one unit. An LED is described with electroluminescent diodes as devices which convert electric energy into visible, infrared or ultraviolet rays. EN 85.41(C). A phototransistor is described as a type of photoelectric receiver characterized by a variation in resistivity when light rays strike its p n junction. EN 85.41(B)(2)(ii). The phototransistor at issue operates by receiving rays from the LED which create a variation in resistivity. When these rays are interrupted, by a shaft or key in some cases, this variation in resistivity ceases. Accordingly, the photosensor satisfies the description of a photosensitive semiconductor device consisting of an electroluminescent diode combined with a phototransistor.
>
> Subheading 8541.40.80, HTSUS, provides for optical coupled isolators. These are described as very small four-terminal electronic circuit elements that include in an integral package a light emitter and light detector. *McGraw-Hill Encyclopedia of Science and Technology* (MH) (6th ed.), vol. 12, p. 419 (1987). The optical emitters most

commonly used in an isolator are LEDs. MH at 419. As stated previously, the photosensor contains a LED. A type of light detector used in isolators are light-sensitive devices that modify a voltage or current such as phototransistors. MH at 419. As stated previously, the subject photosensor contains a phototransistor. Furthermore, a LED-silicon detector combination is cited as a type of optical coupled isolator. MH at 419. A photo-darlington sensor is cited as a type of light detector used in a LED-silicon detector. MH at 420. Accordingly, the photosensor satisfies the description of an optical coupled isolator.

It is our position that, as with the photosensors in HQ 088341, the subject opto sensor is classifiable under subheading 8541.40.80, HTSUS, as an optical coupled isolator. In an optical isolator, the emitting and detecting devices are so positioned that the majority of the emission from the emitter is optically coupled to the light-sensitive area of the detector. This configuration uses an electronic input signal to cause an electronic input signal without any electronic connection between the input (LED) and the output (phototransistor) terminals. The subject merchandise satisfies this description. It is our understanding that the opto sensor is configured in such a way that the light emitted by the LED is optically coupled to the light-sensitive area of the phototransistor sensor. When the rays emitted by the LED are interrupted, the isolator is no longer coupled and does not produce (an output signal addition, no electrical connection exists between the LED and phototransistor within the opto sensor. Therefore, based upon the information you submitted for HQ 953561, the merchandise satisfies the descriptions of how an optical coupled isolator functions.

Consideration was given to classification of the merchandise under subheading 8536.50.80, HTSUS, as other electrical apparatus for switching electrical circuits. However, as we stated in HQ 088341, the merchandise does not meet any of the technical descriptions of switches, nor is the merchandise similar to any of the exemplars listed under Explanatory Note 85.36.

In part, chapter 85, note 5, HTSUS, states that:

> [f]or the classification of the articles defined in this note, headings 8541 and 8542 shall take precedence over any other heading in the tariff schedule which might cover them by reference to, in particular function, their function.

Even if the opto sensor was described under heading 8536, HTSUS, based upon chapter 85, note 5, HTSUS, classification of the merchandise under heading 8541, HTSUS, would take precedence over classification under heading 8536, HTSUS.

Therefore, the merchandise is classifiable under subheading 8541.40.80, HTSUS, as an optical coupled sensor.

Holding:

The opto sensor is classifiable under subheading 8541.40.80, HTSUS, as an optical coupled sensor.

HQ 953561, dated April 15, 1993, is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF AN ORGANIZER/ADDRESS BOOK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs Is modifying a ruling pertaining to the tariff classification of an organizer/address book. Notice of the proposed modification was published on April 12, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 15.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after, July 31, 1995.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7059.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 12, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 15, proposing to modify New York Ruling Letter (NYRL) 854522, July 5, 1991, wherein a looseleaf book consisting of a metal six-ring binder with paper inserts comprising a daily planning system was classified in subheading 4820.10.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides in part for articles similar to diaries, notebooks and address books. No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL 864822, dated July 5, 1991, to reflect the proper classification of the merchandise as bound diaries and address books, of paper or paperboard, of subheading 4820.10.2010, HTSUS. Headquarters Ruling Letter (HRL) 957667, modifying NYRL 864822, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1) Customs Regulations (19 CFR 177.10(c)(1)).

Dated: May 15, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 15, 1995.

CLA-2 R:C:T 957667 ch
Category: Classification
Tariff No. 4820.10.2010

RUBY L. WOOD
EVANS AND WOOD & CO., INC.
PO. Box 610005
D/FW Airport, TX 75261

Re: Modification of NYRL 864822; tariff classification of diaries, notebooks and address books, bound.

DEAR MS. WOOD:

New York Ruling Letter (NYRL) 864822, dated July 5, 1991, concerned the classification of an organizer/address book under the Harmonized Tariff Schedule of the United States (HTSUS). We have had occasion to review this ruling and find that the classification of this article under subheading 4820.10.4000, HTSUS, is in error.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 864822 was published April 12, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 15.

Facts:

In NYRL 864822, the subject merchandise was described as follows:

> It is a 2 × 10 × 17 cm looseleaf book consisting of a metal six ring binder, complete with pages (paper inserts), permanently mounted inside a cover made essentially of plastic and cotton fabric.
>
> The pages are, for the most part, blank sheets that are lined and captioned to permit written entries of various kinds. With the aid of tabbed dividers, they are grouped into a number of different sections, including those for yearly, weekly and daily planning, notes, and telephone/address listings. A few pages are printed with handy reference information, such as a world time chart, a calorie/carbohydrate guide, and a 1991-1992 calendar.
>
> The inside of the cover is fitted with an inexpensive ball point pen, and also incorporates pockets for carrying business cards and loose papers, In addition, the book features a strap/snap closure.

In NYRL 864822, the article was classified under subheading 4820.10.4000, HTSUS, as an article similar to a diary.

Issue:

Whether the subject merchandise is classifiable in subheading 4820.10.201 0, HTSUS, which provides for diaries, notebooks and address books, bound; or subheading 4820.10.4000, HTSUS, which encompasses in part articles similar to diaries, notebooks and address books, and unbound diaries, notebooks and address books?

Law and Analysis

Following the enactment of the HTSUS in 1989, the Area Director of Customs, New York Seaport, issued a number of ruling letters in which merchandise described as organizers, planners, agendas or engagement calendars were not regarded as diaries. At that time, the provision for diaries was reserved for books used as personal journals and suitable for extensive notations or narratives. As the submitted sample was not suitable for these purposes, it was classified as an article similar to a diary.

However, these early decisions were superseded by a series of rulings from Customs headquarters. *See* Headquarters Ruling Letter (HRL) 089960, dated February 10, 1992; HRL 952691, dated January 11, 1993; HRL 953172, dated March 19, 1993; HRL 953413, dated March 29, 1993; HRL 955253, dated November 10, 1993; HRL 955199, dated Janu-

ary 24, 1994. The headquarters decisions made reference to the *Compact Edition of the Oxford English Dictionary* (1987), which defined the term "diary" as:

> 2. A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also applied to calendars containing daily memoranda on matters of importance to people generally, or to members of a particular profession, occupation, or pursuit.

Based upon this language, engagement books, agendas, organizers and planners designed primarily for the receipt of daily memoranda and jottings were classified as diaries.

Furthermore, in recent rulings we have made reference to judicial authority in this area. For example, in *Baumgarten v. United States*, 49 Cust. Ct. 275 (1962), the merchandise was described in part as a:

> [P]lastic covered book, approximately 4¼ by 7⅜ inches in dimensions. Its first few pages contain, successively, the date "1961," the notation "Personal Memoranda," calendars for the years 1960, 1961, and 1962, and a few statistical tables. The following 20-odd pages contain spaces for addresses and telephone numbers, each page more or less set aside for each letter of the alphabet. The remaining portion of the book consists of ruled pages allocated to the days of the year and the hours of the day and each headed with calendars for the current and following months. A blank-lined page, inserted at the end of each month's section, is captioned "Notes."

In *Baumgarten*, the Court observed that:

> [T]he particular distinguishing feature of a diary is its suitability for the receipt of daily notations; and, in this respect, the books here in issue are well described. By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda.

Accordingly, the Court classified an appointment/telephone book with calendars and statistical information as a diary.

Similarly, in *Brooks Bros. v. United States*, 68 Cust Ct. 91 (1972), the submitted sample was an 8 inch by 10 inch **spiral bound** leather book which included pages suitable for use as a diary, but also possessed a significant amount of printed informational material. Citing Baumgarten, the Court noted that the "particular distinguishing feature of a diary is its suitability for the receipt of daily notations." As the informational material did not alter the essential nature of the article, it was classified as a diary.

In light of the foregoing administrative and judicial precedent, we conclude that the instant merchandise is properly classifiable as a diary, as the article functions primarily as a place for the receipt of daily notations. Diaries are classifiable in subheading 4820.10.2010, HTSUS, if they are regarded as bound. However, unbound diaries devolve to subheading 4820.10.4000, HTSUS. In HRL 955516, dated April 8, 1994. we stated that:

> As the "Filofax" diaries contain ring binders that hold loose sheets in place, they are undoubtedly classifiable within heading 4820, HTSUSA. The next issue is whether ring binders make a diary "bound" so as to warrant classification within subheading 4820.10.2010, HTSUSA. This office has consistently held that they do. *See* HRL 089960 (2/10/92; 952691 (1/11/93); and 953172 (3/19/93). This position is supported by the EN to heading 4820, HTSUSA, which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc." It is clear that metal binders were contemplated to fit within this heading's definition of bound articles. We do not agree with protestant's argument that merely because a metal loose leaf ring binder was not expressly cited as an exemplar of a "bound" article in the EN to heading 4820, that it is precluded from classification as such.

Accordingly, Customs has determined that diaries incorporating ring binders are regarded as bound for classification purposes. *See also* HRL 957148, dated October 21, 1994; HRL 955937, dated October 21, 1994. Based on our administrative precedent, the subject merchandise is classifiable as a bound diary of subheading 4820.10.2010, HTSUS.

In a submission, dated February 17, 1995, filed in connection with another matter, you contend that loose sheets of paper secured by means of spiral or metal fasteners are not "bound," as that term is used in heading 4820. You argue that prior administrative decisions in this area do not constitute "legal argument" and imply that they should be disregarded. However, pursuant to Customs Regulation 177.9(a) (19 CFR 177.9(a)), a principle

set forth in previous ruling letters may be cited as authority in the disposition of transactions involving the same circumstances. Consequently, we regard the prior ruling letters in this area as legally significant.

Citing lexicographic sources, you note that the term "bound" is associated with words such as "secured," "firm or fast," "fastened," "tied." On the other hand, the term loose connotes "flexible," "changeable," "unfettered," "free." You assert that looseleaf and spiral fasteners do not secure paper inserts. Rather, they allow their contents to be flexible or changeable. Consequently, you reason that diaries possessing looseleaf or spiral fasteners should be regarded as unbound.

However, ring and spiral fasteners function to secure their contents. They are in fact designed to hold paper in place. In this regard, we direct your attention to subheading 4820,30, HTSUS, which provides in part for binders. The Explanatory Note to the heading, at page 687, states that the heading includes:

> **Binders for holding loose sheets,** magazines, or the like **(e.g. clip binders, spring binders, screw binders, ring binders).** (Emphasis added).

Thus, heading 4820 specifies that the term "binders" include ring binders, and by implication spiral binders, designed for holding loose sheets. The note makes it clear a "binder' is not limited to more traditional bookbinding,

You claim that the term "binders" should be distinguished from the term "bound," as the latter is used in a more limited sense elsewhere in the Note. However, there is no indication that the Explanatory Note draws such a distinction. For this reason, we are of the opinion that the terms "binders" and "bound" should be interpreted in a manner consistent with one another. Thus, loose sheets of paper held together in a looseleaf binder are regarded as bound for classification purposes.

As noted above, the Explanatory Note to heading 4820, at page 687, states that:

> The goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc.

The first portion of this passage indicates that goods of the heading may be bound with materials other than paper, such as leather, plastics or textile material. It is important to recognize that these binding materials are merely examples and do not purport to be all inclusive. We have concluded that a ring binder is such a binding material. The second part of the passage goes on to state that goods of the heading may have reinforcements or fittings of such materials as metal or plastics. A metal ring binder may also be regarded as a metal fitting.

You have identified bound articles possessing metal fittings. Specifically, you observe that bound ledgers and manuals may possess metal fittings for the purpose of placing them on racks. We agree that bound goods of heading 4820 may possess extraneous fittings of metal. However, this point does not bear on the issue of whether a metal binder constitutes binding material. In addition, you have not indicated why a metal ring binder may not also be regarded as a metal fitting. Therefore, we see no need to disturb our findings in this area.

Our attention is also directed to subheading 4820.10.4000, HTSUS, which encompasses in part unbound diaries. You contend that under Customs analysis, the subheading would essentially be an empty provision. Subheading 4820.10.4000, HTSUS, is a residual provision for certain stationery articles and would describe items such as registers and account books. In addition, we note that the breakout for bound diaries occurs at the eight-digit national classification level. National breakouts were frequently inserted into the HTSUS to carry over the tariff treatment of identical merchandise from the prior tariff, the Tariff Schedule of the United States (TSUS). Item 256, TSUS, provided in part as follows:

Blank books, bound	
256.56	Diaries, notebooks and address books * * * 4%
256.58	Other * * * Free

Thus, under the TSUS, articles classifiable as diaries, notebooks and address books were required to be bound. We have been advised that under the TSUS spiral and ring bound diaries were classified in item 256.56, TSUS. It should be noted that in *Brooks Bros., supra.*, a spiral bound leather book was classified as a bound diary. Therefore, our findings in this area are in accord with past Customs practice.

Holding

NYRL 864822, dated July 5, 1991, is hereby modified. The subject merchandise is classifiable under subheading 4820.10.2010, HTSUS, which provides for bound diaries, notebooks and address books. The applicable rate of duty is 3.6 percent *ad valorem*.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decision pursuant to section 625 does not constitute a change of practice of position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CERTAIN INSECTICIDE PREPARATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057 (1993), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of certain insecticide preparations. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 30, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Ave., N.W. (Franklin Court), Washington DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, DC

FOR FURTHER INFORMATION CONTACT: J. G. Hurley, Food and Chemicals Classification Branch, Office of Regulations and Rulings, (202) 482–7096.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L.

102–182, 107 Stat. 2057 (1993), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of certain insecticide preparations.

In New York Ruling Letter (NYRL) 844152 issued on September 12, 1989, certain insecticide preparations were classified in subheading 3002.90.5050, HTSUS, which provides for other toxins, cultures of micro-organisms (excluding yeasts) and similar products. This ruling is set forth as Attachment A to this document.

Customs Headquarters is of the opinion that the classification in NYRL 844152 is in error; additional information furnished Customs on the nature of the insecticide preparations in question shows that they are classifiable in the provision for "Insecticides put up in forms or packings for retail sale or as preparations or articles * * *: Insecticides: Other: Other: Other", in subheading 3808.10.5000, HTSUS. In their condition as imported, the products are neither bacterial toxins (poisonous substances produced by bacteria) nor cultures of micro-organisms, (i.e., a mass of microorganisms growing in a laboratory culture media). Rather, they are formulated products, with the spore having been standardized to a specific concentration and mixed with a surfactant, so that it can be delivered after dilution with water. In other words, they have the character of preparations within the meaning of the Explanatory Notes to heading 3808(2). Paragraph 3 to that note states that "Insecticidal, disinfecting, etc., preparations may have a basis of * * * cultures of microorganisms, etc."

Accordingly, Customs intends to revoke NYRL 844152 as reflected in proposed HRL 954108, set. forth in Attachment B to this document.

Before taking this action, consideration will be given to any written comments timely received. Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9) will not be entertained for actions occurring on or after publication of this notice.

Dated: May 16, 1995.

JOHN G. BLACK,
(for John Durant, Director,
Commercial Rulings Division)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 12, 1989.

CLA–2–30:S:N:N1:238 844152
Category: Classification
Tariff No. 3002.90.5050

MR. DAVID O. ELLIOTT
BARNES, RICHARDSON & COLBURN
475 Park Avenue South
New York, NY 10016

Re: The tariff classification of "Skeetal", "Biobit flowable", "Biobit wettable", and "Foray 48B" from Denmark.

DEAR MR. ELLIOTT:

In your letter dated August 1, 1989, you requested a tariff classification ruling, on behalf of your client.

"Skeetal", "Biobit flowable", "Biobit wettable", and "Foray 48B" are microbial insecticides containing the toxin bacillus thuringiensis and other inert ingredients. "Skeetal" is used to control mosquito larvae. "Biobit flowable", "Biobit wettable", and "Foray 48B" are used to control lepidopterous (caterpillar) larvae.

The applicable subheading for the "Skeetal", "Biobit flowable", "Biobit wettable", and "Foray 48B" will be 3002.90.5050, Harmonized tariff Schedule of the United States (HTS), which provides for toxins, other, other, other. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

This merchandise may be subject to the regulations of the Environmental Protection Agency. You may contact them at 401 M Street, S.W., Washington, DC 20460, telephone number (202) 382–2090.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought tot he attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:F 954108 JGH
Category: Classification
Tariff No. 3808.10.5000

DAVID O. ELLIOTT, ESQ.
BARNES, RICHARDSON & COLBURN
475 Park Ave. South
New York, NY 10016

Re: Classification of certain insecticides—reconsideration of NYRL 844152, dated September 12, 1989.

DEAR MR. ELLIOTT:

The above-cited ruling concerns the classification under the Harmonized Tariff schedule of the United States (HTSUS) of certain spore-crystal complex-based insecticide preparations:

"Skeetal" (flowable concentrate), "Biobit" (flowable concentrate/wettable powder), and "Foray 48B" (flowable concentrate).

Facts:

The active ingredients of these biological insecticides are the spore-crystal complex of the bacterium, which is an aerobic, ciliate bacillus that forms a spore and, at the same time, a proteinaceous parasporal inclusion commonly called a "crystal". In the original classification request the products were described as natural toxins that function as pesticides, living bacterial formulations made by fermentation.

Issue:

Classification of insecticide preparation under subheading 3002.90.5050, HTSUS, or 3808.10.5000, HTSUS.

Law and Analysis:

The Explanatory Notes to heading 3002 state that toxins are poisons secreted by bacteria; also included are toxoids, crypto-toxins, and anti-toxins, of microbial origin. Thus, based on the evidence as originally submitted, classification in heading 3002 was correct.

Subsequently, however, literature submitted on the products composition showed that they were biological insecticides, with the active ingredients being the spores and endotoxin crystals of the *bacterium;* one version was said to contain a crystalline structure, produced in association with each spore which acts as the principal insecticidal component.

In application, it is the crystalline protein action triggered by proteolytic enzymes that provides the intended pesticidal action. The crystalline proteins are highly toxic to pests and specific in their activity. Thus, the insecticidal effect is due to the crystals and not bacterial toxins nor cultures of microorganisms of Heading 3002. The products as imported are neither bacterial toxins (poisonous substances produced by bacteria) nor cultures of micro-organisms, but are insecticidal preparations; the spore has been standardized to a specific concentration and mixed with a surfactant, so that it can be delivered after dilution with water. As pointed out in the Explanatory Notes for Heading 3808, they are products which are applied by spraying, dusting, sprinkling, coating, impregnating, etc.; formulated preparations which achieve their results by nerve-poisoning, stomach-poisoning, asphyxiation or odor. The Notes also state that the insecticidal preparations may have a basis of cultures of micro-organisms.

On the basis of the information supplied on the nature of these products, in the light of the Explanatory Notes, it is concluded that the products being of crystalline action are more properly classifiable as insecticidal preparations, and they are more specifically provided for in heading 3808.

Holding:

Bacterium-based insecticide preparations are classifiable under the provision for insecticides, put up in forms or packings for retail sale or as preparations or articles, other, in subheading 3808.10.5000, HTSUS. The rate of duty is 5 percent *ad valorem*.

NYRL 844152 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CERTAIN MAGNESIUM OXIDE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NYRL) 849858, dated March 16, 1990, concerning the classification of magnesium oxide.

DATE: Comments must be received on or before June 30, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7097.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended be section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of magnesium oxide.

NYRL 849858, dated March 16, 1990, held that magnesium oxide was classified as other metal oxides, in subheading 2825.90.60, Harmonized Tariff Schedule of the United States (HTSUS) (1990). The subheading has been redesignated as subheading 2825.90.90, HTSUS, with a current general rate of duty of 3.7 percent *ad valorem*. It is now Customs position that magnesium oxide is classified in subheading 2519.90.1000, HTSUS (1995), as fused magnesia and dead-burned (sintered) magnesia, with duty at the general rate of 0.3 cents per kg.

Customs intends to revoke NYRL 849858, Attachment A to this document, to reflect the proper classification of magnesium oxide.

Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter 957514 revoking NYRL 849858 and classifying magnesium oxide in subheading 2519.90.1000, HTSUS, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: May 16, 1995.

JOHN G. BLACK,
(for John Durant, Director,
Commercial Rulings Division).

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 16, 1990.

CLA–2–28:S:N:N1:235 849858
Category: Classification
Tariff No. 2825.90.6090

MR. EDMUND J. CORBOY
AUSTIN CHEMICAL COMPANY, INC.
9655 West Bryn Mawr Avenue
Rosemont, IL 60018–5299

Re: The tariff classification of magnesium oxide from Japan.

DEAR MR. CORBOY:

In your letter dated February 20, 1990 you requested a tariff classification ruling.

The applicable subheading for magnesium oxide will be 2825.90.6090, (CAS #1309–48–4) Harmonized Tariff Schedule of the United States (HTS), which provides for other metal oxides. The rate of duty will be 3.7 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought tot he attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:F 957514K
Category: Classification
Tariff No. 2519.90.1000

MR. EDMUND J. CORBOY
AUSTIN CHEMICAL COMPANY, INC.
9655 West Bryn Mawr Avenue
Rosemont, IL 60018–5299

Re: Revocation of New York Ruling Letter (NYRL) 849858; magnesium oxide.

DEAR SIR:

In response to your request for a tariff classification ruling dated February 20, 1990, the Customs Service issued NYRL 849858, dated March 16, 1990, which held that magnesium oxide was classified as other metal oxides, in subheading 2825.90.60, Harmonized Tariff Schedule of the United States (1990)(HTSUS). The subheading has been redesignated as subheading 2825.90.90, HTSUS, with a current general rate of duty of 3.7 percent *ad valorum*. This letter is to inform you that NYRL 849858 no longer reflects the views of the Customs service. The following represents our position.

Facts:

The merchandise is briefly described as magnesium oxide with a Chemical Abstract Service (CAS) registry number of 1309–48–4.

Issue:

The issue concerns the proper classification of magnesium oxide.

Law and Analysis:

Subheading 2519.90.1000, HTSUS (1995), provides for fused magnesia and dead-burned (sintered) magnesia, with duty at the general rate of 0.3 cents per kg.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. The EN to heading 2519 states that the "heading also covers various types of magnesia (magnesium oxide) obtained from natural magnesium carbonate, basic magnesium carbonate, magnesium hydroxide precipitated from sea water, etc." One of the types described is dead-burned (sintered) magnesia.

Further, Note 3(a), Chapter 28, HTSUS, precludes magnesium oxide from coverage in the Chapter which includes subheading 2825.90.60, redesignated as subheading 2825.90.90.

The CAS number indicates that the merchandise is fused magnesia and dead-burned (sintered) magnesia and is classified in subheading 2519.90.1000, HTSUS.

Holding:

Magnesia oxide with a CAS number of 1309–48–4 is classified in subheading 2519.90.1000, HTSUS (1995), as fused magnesia and dead-burned (sintered) magnesia, with duty at the general rate of 0.3 cents per kg.

NYRL 849858 is revoked.

JOHN G. BLACK,
(for John Durant, Director,
Commercial Rulings Division)

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ELECTRIC WINDOW REGULATORS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of electric window regulators. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 30, 1995.

ADDRESS: Written comments (preferably in triplicate) are to he addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act or 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of electric window regulators.

In New York Ruling Letter (NY) 859234, issued on May 8, 1991, electric window regulators, consisting of a motor, and various assemblies, were held to be classifiable under subheading 8501.10.40, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other brushless DC motors of an output not exceeding 37.5 Watts. NY 859234 is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that the, electric window regulators are classifiable under subheading 8708.29.50, HTSUS, which provides for other accessories for motor vehicle bodies. The window regulators are not simply electric motors and cannot be classified under heading 8501, HTSUS. Customs intends to modify NY 859234 to reflect

the proper classification of the electric window regulators under subheading 8708.29.50, HTSUS. Proposed HQ 957575 modifying NY 859234 is set forth in Attachment B to this document.

Claims for detrimental reliance Under, section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date or publication of this notice.

Dated: May 16, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division).

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 8, 1991.

CLA-2-87:S:N:N1:101–850234
Category: Classification
Tariff No. 8501.10.4040, 8302.30.3000,
3920.42.5000, and 3921.13.5000

Re: The tariff classification of *electric window regulators* for automobiles, manual window regulators for automobiles, window glass channels, insulation material, and sound deadener material from Canada.

In your letter dated December 20, 1990 you requested a tariff classification ruling.

The first item which you submitted is an electric window regulator for automobiles. This product is used to convert standard automobile windows to electric power windows. The item consists of an electric motor with a guide attachment which is used to lift and lower the automobile window. You have informed our Buffalo District that the motor is a 12 Volt, one Amp DC motor with a power output of 12 Watts.

The second item is a manual window regulator for automobiles. This product is used to replace worn out window regulators.

The third item is a window glass channel which attaches the window glass to either the electric or manual window regulator.

The fourth item is sound deadener material which consists of reclaimed polyvinylchloride (PVC) sheet. This material is applied to the interior panels of doors and trunk lids to insulate against sound transmission. The material is imported in 5 foot by 6 foot rolls and is not cut to size to fit any particular automobile.

The fifth item is the sound deadener material of item four which is bonded to polyurethane foam. This combination sound deadener/foam insulation is used on the firewall, floor, and trunk of the automobile. It is imported in a foot by 6 foot rolls, and is not cut to size to fit any particular automobile.

The applicable subheading for the window regulator mechanism will be 8501.10.4040. Harmonized Tariff Schedule of the United States (HTS), which provides for other brushless DC motors of an output not exceeding 37.b Watts. The rate of duty will be 6.6 percent *ad valorem*.

The applicable subheading for the manually operated window regulator mechanism will be 8302.30.3000 which provides for other mountings, fittings and similar articles of iron or steel, of aluminum or of zinc suitable for motor vehicles. The rate of duty will be 3.1 percent *ad valorem*.

The applicable subheading for the window channel will be 8302.30.3000 which provides for other mountings, fittings and similar articles of iron or steel, of aluminum or of zinc suitable for motor vehicles. The rate of duty will be 3.1 percent *ad valorem*.

The applicable subheading for the sound deadener material will be 3920.42.5000 which provides for other plates, sheets, film, full and strip of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials, of polymers of vinyl chloride, flexible, other. The rate of duty will be 4.2 percent *ad valorem*.

The applicable subheading for the sound deadener material bonded to foam will be 3921.13.5000 which provides for other plates, sheets, foil and strip, of plastic, cellular, of polyurethane. other. The rate of duty will be 4.2 percent *ad valorem*.

Goods classifiable under the following subheading, which originated in the territory of Canada, will be entitled to the rate of duty as Indicated below, under the United States-Canada Free Trade Agreement upon compliance with all applicable regulations:

Subheading	*Rate of duty % ad valorem*
8501.10.4040	4.6
8302.30.3000	2.1
3920.42.5000	2.9
3921.13.5000	2.9

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:M: 957575 LTO
Category: Classification
Tariff No. 8708.29.50

MR. PAUL J. ROBINSON
TOWER GROUP INTERNATIONAL, INC.
6730 Middlebelt Road
Romulus, MI 48174-2039

Re: Electric window regulators; HQs 083955, 086832, 087909, 950557, 950834; NY 859234 *modified;* section XVI, note 1(1); section XVII, note 2(f); heading 8501; EN 85.01.

DEAR MR. ROBINSON:

This is in response to your letter of December 27, 1994, requesting, on behalf of Rockwell International, Inc., the classification of electric window regulators under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The articles in question are three types of electric window regulators for automobiles. The three types are "push and pull," "arm and sector" and "drum and cable." They are, eased to convert standard automobile windows to electric power windows.

The "push and pull" regulators consist of a motor; tube, cable guide and bracket assembly; drive cable and catch assembly; shaft assembly; clutch housing; clutch spacer; spring; pinion gear; pinion cover; runout tube; and channel assembly. The "arm and sector" regulators consist of a motor; plate assembly; plate (for mounting); arm, sector (jeer and roller assembly; pin (main pivot); rivets (for mounting); and bearing-sector hold down. The

"drum and cable" regulators consist , of a motor; guide track assembly; glass lift; upper and lower cable assemblies; tension spring; motor and adapter plate assembly; drum; drum cover; cup-drum cover; downstop bumper; anti-rattle pad; and anti-rattle bumper.

Issue:

Whether the window regulators are classifiable as electric motors under heading 8501, HTSUS, or as parts of motor vehicles under heading 8708, HTSUS.

Law and Analysis:

The general rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI I states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the Customs Co-operation Council's official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

In NY 859234, issued to you on May 8, 1991, similar electric window regulators were held to be classifiable under subheading 8501.10.40, HTSUS, which provides for other brushless DC motors of an output not exceeding 37.5 watts. You have asked this office for reconsideration of the portion of NY 859234 which concerned these goods.

The headings under consideration are as follows:

8501	Electric motors and generators (excluding generating sets)
8708	Parts and accessories of the motor vehicles of headings 8701 to 8705

Section XVI, note 1(1), HTSUS, states that section XVI (chapters 84 and 85) does not cover articles of section XVII (chapters 86 to 89). However, note 2(f) to section XVII, HTSUS, states that the expressions "parts" and "parts and accessories" do not apply to the electrical machinery or equipment of chapter 85, even if they are identifiable as goods of section XVII, HTSUS. Thus, if the articles are classifiable under heading 8501, HTSUS, they cannot be classified as parts under heading 8708, HTSUS.

EN 85.01, pg. 1333, states that "[e]lectric motors are machines for, transforming electrical energy into mechanical power." "Rotary motors," which produce mechanical power in the form of a rotary motion, "remain classified here even when they are equipped with pulleys, with gear's or gear boxes, or with flexible shaft for operating hand tools." EN 85.01(I)(A), pgs. 1333–1334. This heading also includes "outboard motors" in the form of a unit comprising an electric motor, shaft, propeller and a rudder. EN 85.01, pg. 1334.

Based on these notes, heading 8501, HTSUS, has been broadly interpreted to include electric motors equipped with additional components, even it those components are "quite substantial." *See* HQ 086832, dated May 21, 1990. However, it is clear that heading 8501, HTSUS, does not encompass every assembly which includes an electric motor.

In HQ 950834, dated March 6, 1992, we stated that an electric motor is classifiable under heading 8501, HTSUS, even when imported with additional components (other than those listed in EN 85.01) if:

> (1) those additional components **complement the function of the motor** [HQ 083955, dated July 10, 1989];
>
> (2) those additional components **are devices which motors are commonly equipped** [HQ 087909, dated December 26, 1990];
>
> (3) those additional components **serve merely to transmit the power the motors produce** [HQ 950557, dated December 26, 1991].

We then held that automotive passive seat belt rail assemblies, which consisted of a rail assembly, buckle assembly, cable assembly and a take up drum/motor drive assembly, were not similar to those described in EN 85.01, nor did they fall into any of the three categories of assemblies listed above. We stated that "[u]nlike the clutch motor assembly classified in HQ 083955, and the windshield wiper motor assemblies classified in HQ 950557 * * *, the seat belt assembly contains the actual mechanism or device the motor serves to power."

The window regulators each consist of a motor and various assemblies. For example, the "push and pull" regulators include a tube, cable guide and bracket assembly and a drive cable and catch assembly. The "arm and sector" regulators include a plate assembly and arm, sector gear and roller assembly. The "drum and cable" regulators include a guide track assembly, upper and lower cable assemblies, and a motor and adapter plate assembly.

The window regulators are not similar to the motor assemblies described in EN 85.01, nor do they fall, in any of the categories listed in HQ 950834. In HQ 950557, we stated that windshield wiper motors consisting of a motor, gear mechanisms and shafts, remained classifiable under heading 8501, HTSUS, because these components "serve merely to transmit the power the motors produce."

The additional components of the motor assemblies in question, however, are more substantial than the assemblies of HQ 950557. For example, the window regulators include mounting brackets for the entire assembly, not just the motor itself. They also include components to hold and/or move the window. The window regulators are not simply electric motors, and therefore, cannot be classified under heading 8501, HTSUS.

Heading 8708, HTSUS, describes parts and accessories of the motor vehicles of headings 8701 to 8705, HTSUS. The electric window regulators are principally used on the motor vehicles of headings 8703 and 8704, HTSUS. Therefore, they are classifiable under subheading 8708.29.50, HTSUS, which describes other accessories for motor vehicle bodies.

Holding:

The electric window regulators are classifiable under subheading 8708.29.50, HTSUS, which provides for other accessories for motor vehicle bodies. The corresponding rate of duty for articles of this subheading is 3% *ad valorem*.

NY 859234 is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO NORTH AMERICAN FREE TRADE AGREEMENT ELIGIBILITY FOR CERTAIN DAY PLANNERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two ruling letters pertaining to North American Free Trade Agreement (NAFTA) eligibility for two day planners. Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before June 30, 1955.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, (202) 482–7059.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two ruling letters pertaining to NAFTA eligibility of two day planners.

In New York Ruling Letter (NYRL) 806292 and NYRL 806283, dated February 7, 1995, two day planners were classified in subheading 4820.10.2010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for bound diaries and address books, of paper or paperboard. In addition, Customs concluded that the planners were not originating goods for purposes of the NAFTA. NYRL 806292 and NYRL 806293 are set forth in Attachment A and Attachment B to this document.

However, Customs has concluded that the planners are originating goods for the purposes of the NAFTA. Customs intends to modify NYRL 806292 and NYRL 806293 to reflect the fact that the planners are entitled to preferential treatment under the NAFTA.

Before taking this action, consideration will be given to any written comments timely received. The proposed rulings modifying NYRL 806292 and NYRL 806293 are set forth in Attachment C and Attachment D to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: May 10, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 7, 1995.

CLA–2–48:S:N:N8:234 806292
Category: Classification
Tariff No. 4820.10.2010

MR. JOHN H. MCKEOWN
P.O. Box 909
Laredo, TX 78042–0909

Re: The tariff classification and status under the North American Free Trade Agreement (NAFTA) of "Mead Five Star First Gear Ensemble Binder" from Mexico; Article 509.

DEAR MR. HCKEOWN:

In your letter dated January 23, 1995, to the office of Regulations and Rulings at Washington, DC, on behalf of your client, Mead School and Office Products Corporation, you requested a ruling on the statue of an article designated "Mead Five Star First Gear Ensemble Binder" from Mexico under the NAFTA.

The article is a three ring looseleaf book which binds printed paper sections, the first of which is entitled "Monthly Planner", consisting of 12 sheets in a monthly calendar format, 11 × 8½ inches. This section is also spiral bound between paperboard covers, so that should it be removed from the looseleaf binding it would retain its identity as a bound book/planner.

A second section is a cellophone-wrapped set of white paper, of 100 sheets, with blue lines and a red left-hand margin line. These pages are not bound except by the looseleaf mechanism.

There is, a third section which consists of amber-colored divider sheets of paperboard, each with a plastic slot affixed to the outside edge to accomodate paper inserts, which will be used to identify the section of the book that will be placed in front of or behind the divider card. A strip of such blank paper inserts accompanies the divider cards; the strip is bound by one of the three rings of the book.

Tho book does not have a permanent front cover; it has a permanent back cover of heavy durable paperboard. The book is mounted into a sewn nylon case by slipping the back permanent cover into a slot at the right side of the nylon case. The case also has a smaller slot at the left side, which can accomodate a slip-in stationery article of not more than 4 inches in width. The sample is presented for consideration with this smaller slot not occupied.

The sewn nylon case has a velcro (tm) closure Strip, but is not itself closed otherwise. It functions as the outer cover of the article.

You advise that the nylon case (which you refer to as "cover") and the ring binder are products of China, and the spiral bound monthly planner and other paper products are of U.S.A. origin. The processing in Mexico consists, therefore, essentially of placing the U.S. origin paper good onto the Chinese ring binder (through holes which are presumed to have been punched in the U.S.), and slipping the Chinese ring binder's back permanent cover into a slot at the right side of the Chinese nylon case or cover.

The applicable tariff provision for the Head Five Star First Gear Ensemble Binder will be, as you propose, 4820.10.2010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for: Diaries and address books, bound, of paper or paperboard. The general rate of duty will be 3.6 percent.

The merchandise does not qualify for preferential treatment under the NAFTA because one or more of the non-originating materials used in the production of the goods will not undergo the change in tariff classification required by General Note 12(t)/Chapter 48, HTSUSA.

In this connection, please note Section 102.17(c), Customs Regulations, (19 C.F.R. 102.17(c)), which reads. in pertinent Part: "A foreign material shall not be considered to have undergone the applicable change in tariff classification set out in Section 102.20, or satisfy the other applicable requirements of that Section by reason of simple packing, repacking or retail packaging without more than minor processing".

In our view, the placing of U.S. origin paper articles onto Chinese looseleaf rings is riot "more than minor processing" of those rings Similarly, the slipping of the Chinese looseleaf mechanism into a slot in the Chinese nylon cover is not "more than minor processing" of either the mechanism or the cover.

This ruling is being issued under the provisions of Part 181 of the Customs Regulations (19 C.F.R. 181).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Should you wish to request an administrative review of this ruling, submit a copy of this ruling and all relevant facts and arguments within 30 days of the date of this latter, to the Director, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Ave., N.W. Franklin Court, Washington, DC 20229.

JEAN F. MAGUIRE,
Area Director,
Now York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 7, 1995.

CLA–2–48:S:N:N8 234 806293
Category: Classification
Tariff No. 4820.10.2010

MR. JOHN M. MCKEOWN
P.O. Box 909
Laredo, TX 78042–2D0909

Re: The tariff classification and status under the North American Free Trade Agreement (NAFTA), of "Mead Five Star First Gear Student Day Planner" from Mexico; article 509.

DEAR MR. MCKEOWN:

In your letter dated January 23, 1995, to the Office of Regulations and Rulings at Washington, DC, on behalf of your client, Mead School and Office Products Corporation, you requested a ruling on the status of an article designated "Mead Five Star First Gear Student Day Planner" from Mexico under the NAFTA.

The article is a six-ring looseleaf book, designed to hold pages which measure 7½ × 5⅞ inches. As presented, a sample article, which will be retained for reference, holds or contains pages comprising four sections; Calendar, Assignments, Notes and Telephone/Addressess, and also a six-inch/15 cm transparent plastic ruler.

The book is slipped into a pocket at the right side of the nylon cover. A pad of paper, printed with graph lines, which is hole-punched to fit onto the 6-ring binder mechanism if desired, is slipped into another slot at the right side of the cover.

The left inner side of the cover also has two slots, one of them closed with a slide-fastener (zipper), the other not closed. In the sample presented these two slots are unoccupied. The cover has a velcro (tm) closure, which is a textile strip 1¼" Wide. The paper contents of the folder are visible along the edges of the cover when it is in a closed position.

You advise that the nylon cover and the ring binder are from China, the small plastic ruler is from Taiwan, and the paper products are U.S. origin. The processing in Mexico consists, therefore, essentially of placing the U.S. origin paper goods onto the Chinese ring binder (through holes which are presmued to have been punched in the U.S.), and slipping the Chinese ring binder's back permanent cover into a slot at the right side of the Chinese nylon cover. The Taiwan plastic ruler may then be placed onto the Chinese ring binder, and the U.S. graph pad may be slipped into a slot in the Chinese nylon cover.

The applicable tariff provision for the "Mead Five Star First Gear Student Day Planner" will be, as you suggest, 4820.10.2010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for: Diaries and address books, of paper or paperboard. The general rate of duty will be 3.6 percent.

The merchandise does not qualify for preferential treatment under the NAFTA because one or more of the non-originating materials used in the production of the goods will not

undergo the change in tariff classification required by General Note 12(t)/Chapter 48, HTSUSA.

In this connection, please note Section 102.17(c), Customs Regulations, (19 C.F.R. 102.17(c)), which reads, in pertinent part: "A foreign material shall not be considered to have undergone the applicable change in tariff classification set out in Sec. 102.20, or satisfy the other applicable requirements of that Section by reason of simple packing, repacking or retail packaging without more than minor processing".

In our view, the placing of U.S. origin paper articles onto Chinese looseleaf rings is not "more than minor processing" of those rings. The slipping of the Chinese looseleaf mechanism into a slot in the Chinese nylon cover is not "more than minor processing" of either the mechanism or the cover. Finally, the slipping of the Taiwan ruler onto the Chinese looseleaf mechanism is not "more than minor processing" of the ruler or the mechanism.

This ruling is being issued under the provisions of Part 181 of the Customs Regulations (19 C.F.R. 181).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Should you wish to request an administrative review of this ruling, submit a copy of this ruling and all relevant facts and arguments within 30 days of the date of this letter, to the Director, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Ave. N.W., Franklin Court, Washington, DC 20229.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:T 957704 ch
Category: Classification
Tariff No. 4820.10.2010

MARK SANDSTROM
THOMPSON, HINE AND FLORY
1920 N Street, N.W.
Washington, DC 20036–1601

Re: Modification of New York Ruling Letter 806292; North American Free Trade Agreement eligibility for the "Mead Five Star First Gear Ensemble Binder."

DEAR MR. SANDSTROM:

This is in response to your letter of March 9, 1995, requesting reconsideration of New York Ruling Letter (NYRL) 806292, dated February 7, 1995, in which you were advised in part that the "Mead Five Star First Gear Ensemble Binder" was not an originating good for the purposes of the North American Free Trade Agreement (NAFTA).

Facts:

A sewn nylon cover, a metal three-ring binder, and a heavy durable sheet of paperboard are exported from China to Mexico. In Mexico, the ring binder is riveted to the paperboard sheet. The binder mechanism is then inserted into a slot inside the cover. Paper products of U.S. origin are are cut to specific size, collated, organized, hole-punched and placed in the ring binder or used as a label band for the cover. The paper inserts include a spiral bound monthly calendar with spaces for daily notations, lined white paper wrapped in cellophane, and amber colored divider sheets.

In NYRL 806292, the merchandise was classified in subheading 4820.10.2010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for bound diaries and address books, of paper or paperboard. In addition, Customs concluded that the binder was not an originating good for purposes of the NAFTA.

Issue:

Does the merchandise qualify for NAFTA preferential treatment?

Law and Analysis:

General Note 12(b), HTSUS, provides in pertinent part that:

> For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as *"goods originating in the territory of a NAFTA party"* only if—
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
>
> (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—
>
> > (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or
> >
> > (B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
>
> (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

Thus, General Note 12(b)(ii)(A) specifies in part that merchandise will qualify as originating goods if each of the non-originating materials undergo a change in tariff classification described in subdivision (t). General Note 12(t), Chapter 48, Rule 6, states that "a change to headings 4817 through 4823 from any heading outside that group" will undergo a qualifying change in tariff classification. The rule is applicable to the subject merchandise, as the finished binder is classified within heading 4820, HTSUS. Therefore, the rule indicates that if the components exported from China are not classifiable within headings 4817 through 4823, HTSUS, the finished binder will qualify for NAFTA preferential treatment.

The materials exported from China are not classifiable within headings 4817 through 4823. However, in NYRL 806292 it was stated:

> The merchandise does not qualify for preferential treatment under the NAFTA because one or more of the non-originating materials used in the production of the goods will not undergo the change in tariff classification required by General Note 12(t)/Chapter 48, HTSUSA.
>
> In this connection, please note Section 102.17(c), Customs Regulations, (19 C.F.R. 102.17(c)), which reads in pertinent part: "A foreign material shall not be considered to have undergone the applicable change in tariff classification set out in section 102.20, or satisfy the other applicable requirements of that Section by reason of simple packing, repacking or retail packaging without more than minor processing."
>
> In our view, the placing of U.S. origin paper articles onto Chinese looseleaf rings is not "more than minor processing" of those rings. Similarly, the slipping of the Chinese looseleaf mechanism into a slot in the Chinese nylon cover is not "more than minor processing" of either the mechanism or the cover.

Thus, we reasoned that the processing undertaken in Mexico were non-qualifying operations as set forth in Customs Regulation 102.17(c).

However, NAFTA preference eligibility is governed by General Note 12 of the HTSUS. Part 102 of the Customs Regulations is limited to those purposes set forth in Section 102.0. Hence, reference to Section 102.17(c) in NYRL 806292 was in error. Moreover, in this instance General Note 12(m), concerning non-qualifying operations, is not applicable. Consequently, pursuant to General Note 12(t), Chapter 48, Rule 6, the "Mead Five Star First Gear Ensemble Binder" is eligible for NAFTA preferential treatment.

Holding:

NYRL 806292 is hereby modified.

The subject merchandise is classifiable under subheading 4820.10.2010, HTSUS, which provides in part for bound diaries, notebooks and address books of paper or paperboard.

The merchandise is eligible for preferential treatment under the NAFTA. The applicable rate of duty for such goods from Mexico is Free.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:T 957701 ch
Category: Classification
Tariff No. 4820.10.2010

MARK SANDSTROM
THOMPSON, HINE AND FLORY
1920 N Street, N.W.
Washington, DC 20036-1601

Re: Modification of New York Ruling Letter 806293, North American Free Trade Agreement eligibility for the "Mead Five Star First Gear Student Day Planner."

DEAR MR. SANDSTROM:

This is in response to your letter of March 9, 1995, requesting reconsideration of New York Ruling Letter (NYRL) 806293, dated February 7, 1995, in which you were advised in part that the "Mead Five Star First Gear Student Day Planner" was not an originating good for the purposes of the North American Free Trade Agreement (NAFTA).

Facts:

The article is a six-ring looseleaf book, designed to hold printed pages measuring 7½ inches by 5⅞ inches. The paper inserts comprise a day planner with sections for a calendar, assignments, notes and telephone/addresses. A six-inch transparent plastic ruler and a pad of graph paper are also incorporated into the book.

The sewn nylon cover, metal six-ring binder, and a heavy durable sheet of paperboard are exported from China to Mexico. In Mexico, the ring binder is riveted to the paperboard sheet. The binder mechanism is then inserted into a slot inside the cover. The ruler is exported from Taiwan to Mexico. Paper of U.S. origin is imported into Mexico for use as paper inserts or as label bands. In Mexico, the paper is cut to specific size, collated, organized and hole-punched.

In NYRL 806293, the merchandise was classified in subheading 4820.10.201 0, Harmonized Tariff Schedule of the United States (HTSUS), which provides for bound diaries and address books, of paper or paperboard. In addition, Customs concluded that the binder was not an originating good for purposes of the NAFTA.

Issue:

Does the merchandise qualify for NAFTA preferential treatment?

Law and Analysis:

General Note 12(b), HTSUS, provides in pertinent part that:

> For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as *"goods originating in the territory of a NAFTA party"* only if—
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States or
>
> (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—
>
> (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or
>
> (B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
>
> (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

Thus, General Note 12(b)(ii)(A) specifies in part that merchandise will qualify as originating goods if each of the non-originating materials undergo a change in tariff classification described in subdivision (t). General Note 12(t), Chapter 48, Rule 6, states that "a

change to headings 4817 through 4823 from any heading outside that group" will undergo a qualifying change in tariff classification. The rule is applicable to the subject merchandise, as the finished planner is classified within heading 4820, HTSUS. Therefore, the rule indicates that if the components exported from China and Taiwan are not classifiable within headings 4817 through 4823, HTSUS, the finished binder will qualify for NAFTA preferential treatment.

The materials exported from China and Taiwan are not classifiable within headings 4817 through 4823. However, in NYRL 806292 it was stated:

> The merchandise does not qualify for preferential treatment under the NAFTA because one or more of the non-originating materials used in the production of the goods will not undergo the change in tariff classification required by General Note 12(t)/Chapter 48, HTSUSA.
>
> In this connection, please note Section 102.17(c), Customs Regulations, (19 C.F.R. 102.17(c)), which reads, in pertinent part: "A foreign material shall not be considered to have undergone the applicable change in tariff classification set out in Section 102.20, or satisfy the other applicable requirements of that Section by reason of simple packing, repacking or retail packaging without more than minor processing."
>
> In our view, the placing of U.S. origin paper articles onto Chinese looseleaf rings is not "more than minor processing" of those rings. The slipping of the Chinese looseleaf mechanism into a slot in the Chinese nylon cover is not "more than minor processing" of either the mechanism or the cover. Finally, the slipping of the Taiwan ruler onto the Chinese looseleaf mechanism is not "more than minor processing" of the ruler or the mechanism.

Thus, we reasoned that the processing undertaken in Mexico were non-qualifying operations as set forth in Customs Regulation 102.17(c).

However, NAFTA preference eligibility is governed by General Note 12 of the HTSUS. Part 102 of the Customs Regulations is limited to those purposes set forth in Section 102.0. Hence, reference to Section 102.17(c) in NYRL 806293 was in error. Moreover, in this instance General Note 12(m), concerning non-qualifying operations, is not applicable. Consequently, pursuant to General Note 12(t), Chapter 48, Rule 6, the "Mead Five Star First Gear Student Day Planner" is eligible for NAFTA preferential treatment.

Holding:

NYRL 806293 is hereby modified.

The subject merchandise is classifiable under subheading 4820.10.2010, HTSUS, which provides part for bound diaries, notebooks and address books of paper or paperboard.

The merchandise is eligible for preferential treatment under the NAFTA. The applicable rate of duty for such goods from Mexico is Free.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF A POLYPROPYLENE FABRIC COATED OR LAMINATED WITH PLASTICS MATERIAL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a woven polypropylene fabric coated or laminated with a plastics material. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 30, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act or 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a woven polypropylene fabric coated or laminated with a plastics material. The ruling in question, New York Ruling Letter (NYRL) 899706 of July 27, 1994, classified the fabric in subheading 5407.20.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404, woven fabrics obtained from strip or the like. Classification in heading 5407, HTSUSA, was based upon Customs belief that the plastic coating was not visible to the naked eye and thus, classification in heading 5903, HTSUSA as a coated or laminated fabric was precluded.

At the request of the importer, Customs has reviewed the decision in NYRL 899706 and examined samples of the fabric at issue in its coated

and uncoated condition. Upon reconsideration, Customs believes the plastic coating/lamination is visible and the fabric is properly classified as a coated fabric of heading 5903, HTSUSA.

NYRL 899706 is set forth in Attachment "A" to this document. Proposed HRL 957850 modifying NYRL 899706 is set forth in Attachment "B" to this document. Before taking this action, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: May 16, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 27 1994.
CLA–2–54:S:N:N6: 352 899706
Category: Classification
Tariff No. 5407.20.0000

MR. JOSE RODRIGUEZ
RODENAS & RIVERA S.A.
Calle Murcia, 11
02400 Hellin (Albacete)
Spain

Re: The tariff classification of polypropylene woven fabric from Spain.

DEAR MR. RODRIGUEZ:

In your letter dated May 20, 1994, received in this office June 27, 1994 you requested a tariff classification ruling.

You have submitted two samples of plain woven fabric that are composed of 100% polypropylene. Based on the information provided, one sample is coated and the other is uncoated. The uncoated sample identified as code E9UU, is manufactured with polypropylene strips measuring 1 millimeter (mm) in width. The fabric contains 11 strips per inch in the warp and 10 strips per inch in the filling. Weighing 200 g/m^2, it will be imported in 150 centimeter widths.

The coated sample, identified as code E909 is composed of 100% polypropylene. This merchandise is manufactured with polypropylene strips measuring 1 millimeter (mm) in width. The fabric has been coated on one or both sides with polypropylene. It contains 11 strips per inch in the warp and 10 strips per inch in the filling. The fabric weighs 200 g/m^2 and the coating weighs 30 g/m^2. The combined weight of this textile product is 230 g/m^2. It will be imported in 150 centimeter widths.

Note 2 to Chapter 59, Harmonized Tariff Schedule of the United States (HTS), defines the scope of heading 5903, under which textile fabrics which are coated, covered, impregnated, or laminated are classifiable. Note 2 states that heading 5903 HTS, applies to:

> (A) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square mater and whatever the weight of the plastic material (compact or cellular), other than:

(1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapter 50 to 55, 58 or 60): for the purpose of this provision no account should be taken of any resulting change of color;

Since the polypropylene coating on the fabric sample that is identified as code E909 fabric is not visible to the naked eye, it is not classifiable in heading 5903, HTS.

The applicable subheading for both polypropylene woven fabrics identified as code E9UU and code E909, will be 5407.20.0000, HTS, which provides for woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404, woven fabrics obtained from strip or the like. The duty rate will be 17 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought tot he attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:T 957850 CMR
Category: Classification
Tariff No. 5903.90.2500

MR. JOSE RODRIGUEZ
RODENAS & RIVERA
Calle Murcia
11 02400 Hellin (Albacete)
Spain

Re: Classification of woven polypropylene fabric laminated with polypropylene/polyethylene plastic; modification of NYRL 899706 of July 27, 1994.

DEAR MR. RODRIGUEZ:

This ruling is in response to your request of August 31, 1994, that Customs reconsider its decision in NYRL 899706 in which we classified a woven polypropylene fabric coated with plastic in subheading 5407.20.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). That tariff provision provides for woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404, woven fabrics obtained from strip or the like. Classification in heading 5407, HTSUSA, was based upon Customs belief that the plastic coating was not visible to the naked eye and thus, classification in heading 5903, HTSUSA as a coated or laminated fabric was precluded. Fabric samples in the coated and uncoated condition were received by this office along with your correspondence requesting we review our earlier decision.

Facts:

The coated fabric was identified in NYRL 899706 as code E909. The fabric is composed of 100 percent polypropylene strips measuring under 2 millimeters in width. The fabric is laminated on one surface with a polypropylene/polyethylene copolymer type plastic. The Customs laboratory in New York analyzed the sample fabric and determined the following:

Denier in warp	1155
Denier in filling	1852
Thickness of fabric	0.62mm
Thickness of lamination	0.07mm
Total thickness	0.69mm
Weight of fabric	203.5g (83.4 percent)
Weight of lamination	40.7g (16.6 percent)
Total weight	244.2g (100 percent)

The polypropylene strips used to weave the fabric are white in color. The plastic laminate material is clear.

The woven polypropylene fabric is used in the manufacturing of flexible intermediate bulk containers (large bags) used to ship or transport materials between 1,000 and 4,000 pounds. The fabric will be imported into the United States from Spain.

Issue:

Is the fabric at issue properly classified as a coated or laminated fabric of heading 5903, HTSUSA, or was it properly classified in NYRL 899706 as a woven fabric of heading 5407, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order]."

Heading 5903, HTSUSA, provides for textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902. Textile fabrics classified in this heading must meet the terms of Note 2 of Chapter 59. This note states is relevant part:

> 2(a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:
>
> (1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color;
>
> * * * * * * *

Therefore, for classification in heading 5903, HTSUSA, the pertinent test is whether the plastic coating on the woven polypropylene fabric is visible to the naked eye.

In determining whether a plastic coating or lamination is visible to the naked eye, changes in color must be ignored. Customs has stated in rulings that we cannot consider such things as a change in the "feel" of the fabric (See, HRL 083540 of October 31 1989), or changes in light reflection such as a dulling or sheen which may be the result of a plastics application (See, HRL 084285 of July 20, 1989). These factors could be the effects of a plastics application or of other treatments to a fabric. They are not, however, the visible plastics material itself.

The plastics material must be visibly distinguishable from the fabric. In past rulings, Customs has looked to whether the plastics application has visibly altered the surface character of a fabric. In such instances, Customs has taken the view that in viewing the change in the surface character, it is the plastics material which we are seeing and thus the fabric is considered coated. See, HRL 082219 of November 21, 1988, and HRL 083285 of December 28, 1989. In addition, Customs has stated that the ability to see plastic in the interstices of fabric is evidence that the fabric is coated. When viewing fabric to determine if a plastics material is present, it is permissible to view the fabric from various perspectives: frontal, cross-sectional, and by holding it up to light. See, HRL 086846 of July 23, 1990.

Viewing the submitted sample at an angle to a cross-section of the fabric, a clear flat plastic sheet may be seen at the edges of the fabric. This office also believes that the surface character of the coated sample is different from that of the uncoated sample. Due to the fact the plastics application is clear, we can still view the weave, but it no longer has the depth apparent in the uncoated sample. Based upon our observations, it is our view that the plastic coating is visible and therefore the fabric is classifiable as a coated fabric in heading 5903, HTSUSA.

Holding:

The submitted coated fabric sample is classifiable in subheading 5903.90.2500, HTSUSA, as a textile fabric of man-made fibers, impregnated, coated, covered or laminated with plastics. Goods classified in this provision fall within textile category 229 and are dutiable at 8.4 percent *ad valorem*.

NYRL 899706 of July 27, 1994, is modified in regard to the classification of the coated fabric E909 to reflect the classification set forth above.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to fre-

quent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A TOTE BAG

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification a cotton tote bag. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 30, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, (202) 482–7059.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a tote bag.

In Headquarters Ruling Letter (HRL) 087537, dated October 2, 1990, a cotton tote bag was classified in subheading 4202.22.4500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for certain textile handbags. This ruling letter is set forth in Attachment A to this document.

However, Customs has concluded that the classification of the tote bag in subheading 4202.22.4500, HTSUS, is in error. Customs is of the opinion that the tote bag is properly classifiable in subheading 4202.92.1500, HTSUS, which provides for travel, sports and similar bags, with outer surface vegetable fibers and not of pile or tufted construction, of cotton. Customs intends to modify HRL 087537 to reflect the proper classification of the merchandise in subheading 4202.92.1500, HTSUS.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling revoking HRL 087537 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: May 10, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 2, 1990.

CLA–2 CO:R:C:G 087537 JS
Category: Classification
Tariff No. 4202.22.4500

LOUIS SHOICHET
TOMPKINS AND DAVIDSON
One Whitehall Street
New York, NY 10004

Re: Tote bags.

DEAR MR. SHOICHET:

This is in reference to your letter of July 9, 1990, on behalf of Toppers, Inc., requesting classification of a tote bag under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA").

Facts:

The merchandise at issue is a 100 percent cotton woven bag measuring approximately 14 × 10 × 5 inches. It has a reinforced open top with double carrying straps. The article has no lining and no interior or exterior pockets or compartments.

In your letter, you ask that the subject tote bags be classified as handbags in accordance with heading 4202 of the HTSUSA and HRL 086094 (March 16, 1990).

Issue:

Whether a tote bag is considered luggage or handbags under the HTSUSA?

Law and Analysis:

Heading 4202, HTSUSA, provides for:

> Trunks, suitcases, vanity cases, attaches cases, briefcases, school satchels and similar containers; traveling bags * * * handbags * * * sports bags * * * and similar containers of textile material * * *

It is our position that the bags at issue, by reason of their design and construction, are similar to handbags and therefore correctly classifiable under heading 4202, HTSUSA. In addition, please note that HRL 086676, which amended HRL 086094, classified tote bags as handbags in subheading 4202.22.4500.

Therefore, due to the similarities between the present merchandise and that of the rulings above, namely, that such bags are not designed to contain personal effects during travel or for use as shopping bags, are not restricted to use for carrying purchases from place of purchase to place of use, and are used as secondary handbags, indicate that classification of the present merchandise under subheading 4202.22, rather than under a provision for "luggage," is appropriate.

Holding:

The tote bags at issue are classified in subheading 4202.22.4500, HTSUSA, which provides for handbags, whether or not fitted with shoulder straps, including those without handle, with outer surface of textile materials, other, of vegetable fibers and not of pile or tuft construction, of cotton, textile category 369. The rate of duty is 7.2 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Services which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact its local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Operations Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:T 957917 ch
Category: Classification
Tariff No. 4202.92.1500

LOUIS S. SHOICHET, ESQ.
TOMPKINS & DAVIDSON
One Astor Plaza
1515 Broadway—43rd Floor
New York, NY 10036

Re: Modification of Headquarters Ruling Letter 087537; tariff classification of a tote bag; travel, sports and similar bag; not a handbag.

DEAR MR. SHOICHET,

In Headquarters Ruling Letter (HRL) 087537, dated October 2, 1990, you were advised that the tariff classification for a tote bag was subheading 4202.22.4500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for handbags, with outer surface of certain textile materials. We have had occasion to review HRL 087537 and find that the tariff classification of the tote bag is partially in error.

Facts:

In HRL 087537 the goods were described as follows:

> The merchandise at issue is a 1 00 percent woven cotton bag measuring approximately 14 × 10 × 5 inches. It has a reinforced open top with double carrying straps. The article has no lining and no interior or exterior pockets or compartments.

Issue:

What is the proper tariff classification for the tote bag?

Law and Analysis:

HRL 087537 made reference to the similarity between the instant merchandise and the goods at issue in HRL 086094, dated March 16, 1990 (modified for reasons not relevant here in HRL 086676, dated March 21, 1990). In HRL 086094, we concluded that certain tote bags were classifiable as handbags, as they "function primarily as secondary handbags used to carry various objects which do not fit into a woman's regular handbag." This rationale was enunciated in *J. E. Mamiye & Sons, Inc. v. United States*, 509 F. Supp. 1268, 85 Cust. Ct. 92 (1980), *aff'd*, 665 F.2d 336, 69 C.C.P.A. 17 (1981) decided under the prior tariff, the Tariff Schedules of the United States (TSUS). In that decision, the Court concluded that the tariff item for handbags prevailed over a provision for textile shopping bags. In light of this precedent, the subject merchandise was classified as a handbag of subheading 4202.22, HTSUS.

However, HRL 086094 and HRL 086676 were subsequently revoked by HRL 950708, dated December 24, 1991. In that decision, we observed that:

> HRL 086094 followed the rationale of *J.E. Mamiye & Sons, Inc. v. U.S.*, 509 F. Supp. 1268 (1980), *aff'd*, 665 F.2d 336 (1981), in which the court addressed the issue of whether tote bags, which varied in size, color and material, were properly classifiable under the Tariff Schedules of the United States Annotated in a specific provision for handbags or as shopping bags under a provision for textile articles not specially provided for. The court noted that tote bags are used to carry items which do not ordinarily fit within a women's handbag and, on this basis, held that they were similar to handbags. In so holding, the court stated in relevant part:
>
> > The primary issue presented is whether the imported tote bags are handbags as claimed or whether they are excluded from classification under item 706.24, supra, by virtue of being shopping bags in accordance with Headnote 2(b) of Schedule 7, Part 1, Subpart D * * * As indicated, *supra*, the provision for handbags is an eo nomine provision * * * Ordinarily, use is not a criteria in determining whether merchandise is embraced within an eo nomine provision. However, use may be considered in determining the identity of en nomine designation * * *
> >
> > Following this principle the record establishes that the involved tote bags are utilized by women as second handbags to carry items which do not ordinarily fit

> within a handbag * * * Accordingly, it is apparent that, while a tote bag may be used to carry purchases, nine of the eighteen witnesses who testified indicated it is used for the convenience of those items which do not fit within a handbag. Such testimony is sufficient to establish the use of a tote bag to be similar to a handbag * * *

Id. at 1274.

The canvas tote bags in question may in some circumstances be used by women as secondary handbags, that is to carry items which do not ordinarily fit within a handbag. However, cotton tote bags similar to those at issue are used for a variety of purposes. In *Adolco Trading Co. v. United States*, 71 Cust. Ct. 145, C.D. 4487 (1973), tote bags were described in broad terms.

> [T]he term "tote is a general one used to indicate all types of carry bags, regardless of whether they are used for shopping or travel * * *
>
> * * * * * * * * * * * *
>
> * * * [T]he word "tote" is a general term used by many manufacturers to refer to carry bags * * *.

Id. at 151–152. The court concluded that:

> The evidence establishes that * * * the term tote or tote bag is used in the trade to cover various types of carry bags, including shopping bags, and bags which may be luggage * * * and others which may be handbags * * *. Thus the fact that an article may be bought, sold or referred to as a tote or tote bag does not establish that it is a handbag. * * *

Id. at 155.

The tote bags at issue are made from cotton canvas and are often printed with company logos, or promotional or advertising information. Styles 103 and 128 have single snap closures; the rest have no means of closure. The bags have no pockets and are not lined or reinforced. Since they are of relatively coarse construction, carry advertising and provide little protection for the items they may contain, it is unlikely that the tote bags in question are used in a manner similar to a women's handbag.

The provision for travel, sports and similar bags is defined by Additional U.S. Note 1, Chapter 42, HTSUSA, as follows:

> For the purposes of heading 4202, the expression *"travel, sports and similar bags"* means goods, other than those falling in subheadings 4202.11 through 4202.39, of a kind used for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers.

Instead, it is Customs' opinion that canvas tote bags similar to those at issue are used as multipurpose bags to carry any number of sundry articles, such as food, books and/or clothing. Since they do not fit the terms of subheadings 4202.11 through 4202.39, and since they are a type of bag used to carry clothing and other personal effects during travel, Customs considers them to be travel, sports and similar bags within the meaning of Additional U.S. Note 1, Chapter 42, HTSUSA.

In HRL 951113, dated May 19, 1992, we were asked to reconsider HRL 950708. At that time, we stated that:

> By specifically including shopping bags of this heading within the broad category of goods designed for carrying personal effects during travel, it is clear Congress (a) took notice that shopping bags may be correctly classifiable within heading 4202, HTSUSA, and (b) did not intend for the "travel, sports and similar bags" provision to encompass only those bags sufficiently sturdy to withstand the rigors of travel that conventional luggage is designed to meet.

Accordingly, HRL 950708 was affirmed.

In view of the foregoing, the Customs Service is no longer of the opinion that tote bags of a kind similar to the instant goods are classifiable as handbags. Rather, they are regarded as multipurpose bags for carrying various personal effects. We note that samples of the goods in question possess hangtags which market the totes as follows:

Canvas Tote
Hand/Shoulder Strap
Travel-Shopping-Beach
Book-School-Knitting

Therefore, the totes are regarded as travel, sports and similar bags of subheading 4202.92, HTSUS.

Holding:

The subject merchandise is classifiable under subheading 4202.92.1500, HTSUS, which provides for travel, sports and similar bags: with outer surface of textile materials: of vegetable fibers and not of pile or tufted construction: of cotton. The applicable rate of duty is 7.1 percent *ad valorem*. The textile category is 369.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are the subject of frequent negotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–85)

SKF USA INC. AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 93–08–00499

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") (1) use of best information available in the calculation of constructed value; (2) requirement that the cost of material inputs obtained from related suppliers approximate arm's-length price; (3) twice adding profit with regard to inputs purchased from a related supplier, once in the calculation of constructed value for the entire subject article and again in the calculation of material costs for inputs obtained from related suppliers; (4) deduction of direct selling expenses from U.S. price in exporter's sales price comparisons; and (5) denial of a direct adjustment for third country cash discounts.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and this case is remanded to Commerce for removal of best information available from Commerce's constructed value calculation of related party inputs. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated May 8, 1995)

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel, Anne Talbot, Patricia M. Steele and *Juliana M. Cofrancesco)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* of counsel: *Thomas H. Fine, Michelle Behaylo, David Ross* and *Stacy J. Ettinger,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Lane S. Hurewitz, Geert De Prest and *Myron A. Brilliant)* for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, SKF USA Inc. and SKF Sverige AB (collectively, "SKF"), commenced this action challenging certain aspects of

the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of its administrative review concerning antifriction bearings ("AFBs") (other than tapered roller bearings) and parts thereof. *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results")*, 58 Fed. Reg. 39,729 (July 26, 1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 42,288 (August 9, 1993), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 51,055 (September 30, 1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 59 Fed. Reg. 9,469 (February 28, 1994).

Specifically, plaintiffs contest Commerce's (1) use of best information available ("BIA") in the calculation of constructed value ("CV"); (2) requirement that the cost of material inputs obtained from related suppliers approximate arm's-length price; (3) twice adding profit with regard to inputs purchased from a related supplier, once in the calculation of constructed value for the entire subject article and again in the calculation of material costs for inputs obtained from related suppliers; (4) deduction of direct selling expenses from U.S. price ("USP") in exporter's sales price ("ESP") comparisons; and (5) denial of a direct adjustment for home market cash discounts.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (May 15, 1989).

On April 27, 1993, Commerce published the preliminary results of the subject review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 58 Fed. Reg. 25,606 (April 27, 1993).

On July 26, 1993, Commerce published the final results at issue in this case involving AFBs from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom. *Final Results,* 58 Fed. Reg. at 39,729, as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 42,288 (August 9, 1993), *Antifriction Bear-*

ings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews, 58 Fed. Reg. 51,055 (September 30, 1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 59 Fed. Reg. 9,469 (February 28, 1994).

On August 24, 1993, SKF filed its summons in this case, challenging the final results with respect to Sweden.

DISCUSSION

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed Cir. 1990).

1. *Constructed Value Calculations:*

SKF makes three arguments with regard to Commerce's calculation of constructed value. First, SKF asserts Commerce improperly resorted to best information available by increasing by eight percent all material costs for inputs obtained by related suppliers reported by SKF. Citing to the cost of production and constructed value portions of Commerce's questionnaire and its "Section D" response, as well as supplemental questionnaire and response, SKF states Commerce erred as the information allegedly not supplied by SKF had never been requested in the first place. SKF asserts it fully responded to the questions asked both in the initial questionnaire and in the supplemental questionnaire. *Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record ("SKF's Brief")* at 14–23.

Second, SKF alleges Commerce erred in concluding that cost of material inputs obtained from related suppliers for CV purposes must approximate an arm's-length price. SKF asserts that the antidumping law does not permit the addition of an amount of eight percent for profit to approximate an arm's-length price for related supplier inputs, where transfer prices were not reported and there is nothing on the record which indicates the values reported were less than the cost of production ("COP"). 19 U.S.C. § 1677b(e)(2) and (3) (1988). SKF therefore asserts it properly reported the actual manufacturing costs incurred by related suppliers and did not report transfer prices. Further, SKF contends not all its material inputs were obtained from related suppliers; and therefore were already reported at arm's-length prices and should not have

had their reported value increased for profit. As to these material inputs obtained from unrelated suppliers, SKF states it reported the actual prices it paid for the inputs. *SKF's Brief* at 24–29.

Third, SKF contends Commerce acted contrary to law by adding profit both in the calculation of CV for the entire subject article and in the calculation of material costs for inputs obtained from related suppliers. SKF asserts that only one addition of profit, in the calculation of CV for the entire article, should be made. SKF points out that it reported, in compliance with 19 U.S.C. § 1677b(e)(1) (1988), constructed values which included profit for each class or kind of merchandise as the greater of actual profit calculated or eight percent of the sum of material and fabrication costs and general expenses. Consequently, SKF argues it was contrary to law for Commerce to additionally increase the value of all material inputs by eight percent. *SKF's Response to the Cost of Production and Constructed Value Portions of Commerce's "Section D" Questionnaire* at 5–6; *SKF's Brief* at 6, 29–34.

Commerce concedes that its questionnaire was unclear as to whether SKF was required to report the transfer price of related party inputs or the related party's COP of the inputs. Commerce also concedes that it neither gave any indication that SKF's response was deficient nor requested transfer prices of SKF. Consequently, Commerce requests a remand in order to remove BIA from the valuation of SKF's inputs purchased from related parties in its calculation of CV. Commerce also requests a remand to consider whether it may appropriately use transfer prices if they are higher than the costs of producing the inputs and, if necessary, to request transfer prices from SKF. Unsure of its reading of *Federal-Mogul Corp. v. United States*, 18 CIT ___, ___, 862 F. Supp. 384, 403–04 (1994), *mot. granted, remanded*, 18 CIT ___, 872 F. Supp. 1011 (1994), Commerce requests instruction from this Court as to whether the minimum eight percent profit is to be added twice in the CV calculation—once on each related party input and a second time to the total cost of all inputs. *Defendant's Memorandum in Opposition to the Motion of SKF USA, Inc. and SKF Sverige AB for Judgment Upon the Agency Record ("Defendant's Brief")* at 3–6.

Defendant-intervenor The Torrington Company ("Torrington") asserts application of BIA was appropriate because both the statute and Commerce's questionnaire required SKF to report transfer prices for related party inputs. Torrington argues the BIA chosen was reasonable and did not involve double counting. Citing *Federal-Mogul*, Torrington states Commerce merely made certain that the appropriate COP of material inputs existed before applying the statutory profit for CV calculations. Torrington also contends related party input costs require an eight percent profit adjustment so that they represent arm's-length values. *Opposition of Defendant-Intervenor The Torrington Company to the Motion of the Plaintiffs for Judgment Upon the Administrative Record ("Torrington's Brief")* at 6–15.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") agrees with the position of Torrington. *Response of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record ("Federal-Mogul's Brief")* at 4–9.

First, as to the application of BIA, this Court finds that Commerce inappropriately applied BIA. Commerce's questionnaire is ambiguous as to whether Commerce was requesting transfer prices or COP of related party inputs. *See Section D Questionnaire,* Public Doc. No. 2 at 73–74. Further, Commerce neither gave any indication that SKF's response was deficient nor requested transfer prices of SKF. Therefore, this Court remands this issue for removal of BIA from Commerce's CV calculation. *See* 19 U.S.C. § 1677e(c) (1988).

Further, the statutory provisions at issue and invoked by the parties are as follows:

> **(e) Constructed value**
>
> **(1) Determination**
>
> For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—
>
> **(A)** the cost of materials * * *
>
> **(B)** an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—
>
> * * * * * * *
>
> **(ii)** the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost;
>
> * * * * * * *
>
> **(2) Transactions disregarded; best evidence**
>
> For the purposes of this subsection, a transaction directly or indirectly between * * * [related parties] may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available * * * .
>
> **(3) Special rule**
>
> If, regarding any transaction between * * * [related parties] involving the production by one of such persons of a major input to the merchandise under consideration, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the costs of production of such input, then the administering authority may determine the value of the major input on the best evidence available regarding such costs of production, if

> such costs are greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(e).

Under 19 U.S.C. § 1677b(e)(2), Commerce is granted the discretion to disregard transfer prices, if the respondent cannot demonstrate that such prices are consistent with arm's-length prices. Clearly, however, the statute can only apply if the respondent has reported or relied upon transfer prices. SKF did not report or rely upon transfer prices, but provided manufacturing costs. Thus, this part of the statute is inapplicable.

19 U.S.C. § 1677b(e)(3) is also inapplicable in this case. This provision applies where Commerce has reasonable grounds to believe or suspect that the value attributed to inputs is less than the costs of producing those inputs. Commerce has accepted cost of production as the best evidence of the value of inputs from SKF's related supplier. There is no evidence on the record and the defendant-intervenors have not presented any evidence which would suggest that the amount represented as the value of these inputs is less than the COP of the inputs.

Further, defendant-intervenors' reliance on *Federal-Mogul* is misplaced. In *Federal-Mogul,* this Court required Commerce to include the statutory minimum adjustment for profit in calculating constructed value. That instruction was based solely on 19 U.S.C. § 1677b(e)(1). After denying a profit adjustment to COP information of inputs pursuant to 19 U.S.C. § 1677b(e)(3) and disregarding arguments for a similar adjustment pursuant to 19 U.S.C. § 1677b(e)(2), the Court there stated, Commerce "is obligated to allocate profit, as well as various costs and expenses to the products under investigation. *See* 19 U.S.C. § 1677b(e)(1)." *Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 404.

In this case, it is the cost of production of inputs that is at issue. Thus, under both 19 U.S.C. § 1677b(e)(2) and (3), there is no adjustment for profit required in the calculation of COP of inputs. *See* discussion *supra.* However, in its calculation of CV, pursuant to 19 U.S.C. § 1677b(e)(1), Commerce must make the necessary adjustment for profit, as was done in *Federal-Mogul. See Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 404. As required by 19 U.S.C. § 1677b(e)(1), a minimum of eight percent profit has already been added to SKF's general expenses and cost of manufacture on the CV calculated for all subject merchandise. *SKF's Response to the Cost of Production and Constructed Value Portions of Commerce's "Section D" Questionnaire,* at 5–6; *SKF's Brief* at 6.

Finally, this Court does not reach the issue of whether Commerce is required to prefer, when considering related party inputs, the transfer price if it is greater than the COP. In this case, Commerce has chosen COP and SKF has provided the requested information. As the choice of COP is in accordance with law and supported by substantial evidence, this Court will not remand this issue merely for Commerce to reconsider its choice in this case.

Accordingly, this issue is remanded only for Commerce to remove best information available from Commerce's constructed value calculation

of related party inputs (its increase of SKF's value for inputs by a factor of eight percent for profit), leaving untouched its profit adjustment to the total constructed value made under 19 U.S.C. § 1677b(e)(1)(B)(ii). *See, e.g., SKF USA Inc., SKF France, S.A. and SARMA v. United States,* 19 CIT ___, ___, Slip Op. 95–67 at 12 (April 19, 1995).

2. *U.S. Direct Selling Expenses:*

SKF asserts Commerce erred in treating SKF's U.S. direct selling expenses as a reduction to U.S. price rather than an addition to foreign market value on exporter's sales price sales. SKF states direct selling expenses should be added to FMV as a matter of law and Commerce acted contrary to the statute and to explicit direction from this Court in deducting them from USP. *SKF's Brief* at 34–36.

While conceding that this Court has ruled adversely to its position on this point, Commerce contends it has acted consistently with 19 U.S.C. § 1677a(e)(2) (1988), rather than adding direct selling expenses to FMV pursuant to the circumstance of sale adjustment contained in 19 U.S.C. § 1677b(a)(4)(B) (1988). Commerce points out its policy has recently been vindicated by the Federal Circuit in *Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A. v. United States,* 36 F.3d 1565 (Fed. Cir. 1994), *on remand, remanded,* 1994 CIT LEXIS 213 (1994). *Defendants' Brief* at 6–8.

Citing *Koyo Seiko,* the defendant-intervenors support Commerce's position. *Torrington's Brief* at 16; *Federal-Mogul's Brief* at 9.

The Federal Circuit explained Commerce's practice as follows:

> Commerce's practice evidences an attempt to make mirror-image adjustments to foreign market value and exporter's sales price so that they can be fairly compared at the same point in the chain of commerce. The procedure is as follows: In an exporter's sales price transaction, after an initial exporter's sales price is calculated, that value is adjusted, *inter alia,* pursuant to section 1677a(e)(2) by deducting therefrom all selling expenses (both direct and indirect) incurred in making U.S. sales. Then, in determining an initial foreign market value, appropriate sales are identified in the home market or third country pursuant to 19 U.S.C. § 1677b(a). Next, the initial foreign market value is adjusted, *inter alia,* by deducting therefrom a "circumstances of sale" amount to account for "any difference between the United States price and the foreign market value," 19 U.S.C. § 1677b(a)(4), for example, direct selling expenses incurred in making home market sales. In this way, the section 1677b(a)(4) adjustment to foreign market value counterbalances the section 1677a(e)(2) adjustment to exporter's sales price. As a result, the two parameters may be compared on equivalent terms.

Koyo Seiko, 36 F.3d at 1573.

The Federal Circuit went on to specifically uphold Commerce's reading of the statute:

> Nothing in the plain language or the legislative history of the Antidumping Act precludes Commerce's approach of adjusting exporter's sales price by deducting therefrom certain direct selling

> expenses incurred in the United States. Indeed, Commerce's stated rationale for its approach is well within the bounds of reasonableness. Moreover, because we recognize that Commerce is "the 'master' of the antidumping law, worthy of considerable deference," *Daewoo Elecs.*, 6 F.3d at 1516, we defer to its approach.

Id. at 1575.

Accordingly, as the law is now clear that Commerce's methodology of adjusting United States price for selling expenses, both direct and indirect, incurred with respect to ESP sales, is reasonable and in accordance with law, this Court affirms Commerce on this issue. *See, e.g., SKF USA Inc., SKF France, S.A. and SARMA v. United States,* 19 CIT at ____, Slip Op. 95–67 at 14.

3. *Third Country Cash Discounts:*

SKF asserts Commerce improperly disallowed as direct adjustments to foreign market value, and treated as indirect expenses, certain of SKF's third country cash discounts. SKF contends it reported the discounts on a transaction-specific basis, according to customer number-specific payment terms which were applicable equally to all merchandise in a transaction and were adjusted to reflect actual discounts paid. SKF states its reporting was in accordance with the manner in which customers took discounts and the discounts were recorded in the company's books. SKF explains that it reported a rate of discount separately for each customer number, which rates were applied to only those transactions eligible for a discount based on the relevant payment terms. Further, SKF states the actual payment of a cash discount will usually occur as a remittance of multiple invoices, and remittance of a discounted payment against several invoices cannot be traced to a specific transaction because of the manner in which customers have taken their discounts. *SKF's Brief* at 10–12, 36–42.

Commerce responds that it properly rejected the direct adjustments because they were not reported on a transaction-specific basis. Commerce treated these adjustments as indirect selling expenses because they were reported on a customer- or distributor-specific basis. *Defendant's Brief* at 8–13.

Torrington agrees that Commerce properly disallowed a direct adjustment to FMV, but argues that Commerce erred in allowing even an indirect adjustment to FMV for billing adjustments because they could not be identified to particular sales transactions or be limited to in-scope merchandise. *Torrington's Brief* at 16–18.

Commerce explained its methodology in the Final Results:

> [D]iscounts, rebates, or price adjustments based on allocations are not allowable as direct adjustments to price. Allocated price adjustments have the effect of distorting individual prices by diluting the discounts or rebates received on some sales, inflating them on other sales, and attributing them to still other sales that did not actually receive any at all * * *.
>
> Therefore, we have made direct adjustments for reported home market discounts, rebates, and price adjustments if (a) they were

> calculated on a transaction-specific basis and were not based on allocations, or (b) they were granted as a fixed and constant percentage of sales on all transactions for which they are reported. If these adjustments were not fixed and constant but were allocated on a customer-specific or a product-specific basis, we treated them as indirect selling expenses. We did not accept discount or rebate amounts based on allocations unless the allocations calculate the actual amounts for each individual sale.

Final Results, 58 Fed. Reg. at 39,759.

Commerce makes adjustments for discounts, rebates and other billing adjustments pursuant to 19 U.S.C. § 1677a (1988) and 19 U.S.C. § 1677b (1988), which require it to determine what price was actually charged for subject merchandise. *See Torrington Co. v. United States,* 17 CIT ____, ____, 818 F. Supp. 1563, 1578–79 (1993). More specifically, the Federal Circuit has held that, to allow an adjustment to FMV, it must be directly correlated with specific in-scope merchandise on the basis of actual costs. *Smith-Corona Group v. United States,* 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

This Court finds that SKF reported its third country cash discounts on a customer-specific basis. The discounts reported were determined by customer number, with separate rates reported for each customer number. *SKF's Brief* at 11. The actual payment of a cash discount usually occurred as a remittance of multiple invoices and, consequently, remittance of a discounted payment against several invoices could not be traced to a specific transaction. *Id.* at 11–12.

Accordingly, this Court affirms Commerce's decision to deny direct adjustments to FMV for third country billing adjustments because SKF did not report them on a transaction-specific basis and they were not a fixed and constant percentage of sales price over all sales. *See, e.g., SKF USA Inc. and SKF Industrie, S.p.A.,* 19 CIT ____, ____, Slip Op. 95–6 at 22 (January 20, 1995). As to Commerce's decision to treat billing adjustments as indirect selling expenses when reported on a customer-specific basis, this Court finds, as it has done in the past, that methodology to be reasonable and in accordance with law. *See Torrington Co. v. United States,* 17 CIT ____, ____, 832 F. Supp. 365, 377 (1993), *modified, in part, remanded,* 18 CIT ____, 850 F. Supp. 7 (1994). Therefore, this Court affirms Commerce's action as to this issue.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for removal of best information available from Commerce's constructed value calculation of related party inputs. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 95–86)

PHIBRO ENERGY, INC., ET AL., PLAINTIFFS *v.*
RONALD H. BROWN, ET AL., DEFENDANTS

Court No. 92–06–00394

Plaintiffs move for judgment on the agency record to challenge an order of the United States Foreign-Trade Zones Board denying as not in the public interest an application filed by the Port of Houston Authority for special-purpose subzone status for plaintiffs' petroleum refinery in Texas City, Texas. *Application of the Port of Houston Authority,* 56 Fed. Reg. 67,058 (U.S. Foreign-Trade Zones Bd. 1991) (resolution and order). Amici curiae contend plaintiffs are not real parties in interest.

Held: Plaintiffs may properly bring this action. The Board failed to articulate the basis upon which it denied as not in the public interest the application filed. The Court remands this action to the Board so that it may explain fully the rationale underlying its decision to deny the application.

(Dated May 9, 1995)

Williams & Connolly (John G. Kester and *David D. Aufhauser),* for plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark S. Sochaczewsky* and *Carla Garcia Benitez); Robert J. Heilferty,* Attorney-Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, for defendants.

Bracewell & Patterson (Scott H. Segal and *Gene E. Godley)* and *S. Lee Wingate* (Counsel to the City of Texas City), of Counsel, for Amici Curiae the City of Texas City, the Texas City Independent School District, the County of Galveston, and College of the Mainland.

OPINION

CARMAN, *Judge:* Plaintiffs Phibro Energy USA, Inc. and Phibro Energy, Inc. (collectively "plaintiffs")[1] move for judgment on the agency record pursuant to U.S. CIT R. 56.1. In their motion plaintiffs seek judicial review of an order of the United States Foreign-Trade Zones Board (Board) denying as not in the public interest an application filed by the Port of Houston Authority for special-purpose subzone status for plaintiffs' petroleum refinery in Texas City, Texas. *Application of the Port of Houston Authority,* 56 Fed. Reg. 67,058 (U.S. Foreign-Trade Zones Bd. 1991) (resolution and order). Defendants oppose the motion. Amici curiae the City of Texas City, the County of Galveston, the Texas Independent School District, and College of the Mainland (collectively "amici"), support the Board's decision and contend plaintiffs are not real parties in interest. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i)(1), (4) (1988).

BACKGROUND

A. *Procedural History:*

Plaintiffs commenced this action and moved for judgment upon the agency record in the United States Court of International Trade (CIT)

[1] Plaintiffs inform this Court that plaintiff Phibro Energy USA, Inc. is a wholly-owned subsidiary of plaintiff Phibro Energy, Inc.

in 1992. Defendants opposed plaintiffs' motion and argued the Foreign-Trade Zones Act (FTZA) did not provide for judicial review of a denial of a subzone application. *See Phibro Energy, Inc. v. Franklin*, 17 CIT ____, ____, 822 F. Supp. 759, 761 (1993) *(Phibro I)*. The CIT denied plaintiffs' motion and dismissed the action for lack of subject matter jurisdiction. *See id.* at ____, 822 F. Supp. at 766.[2] The United States Court of Appeals for the Federal Circuit (CAFC) subsequently granted plaintiffs' unopposed motion for summary reversal in view of the CAFC's decision in *Conoco, Inc. v. United States Foreign-Trade Zones Board*, 12 Fed. Cir. (T) ____, 18 F.3d 1581 (1994) *(Conoco II)*,[3] and remanded to the CIT for adjudication on the merits. *See Phibro Energy, Inc. v. Brown*, No. 93–1389, Slip Op. at 1 (Fed. Cir. 1994). The present opinion rules on the merits of this action.

B. *Facts:*

The Port of Houston Authority submitted to the Board an application on behalf of plaintiffs to establish two special-purpose foreign-trade subzones for refinery sites in Houston and Texas City, Texas. (R. 1.)[4] The application stated foreign-trade subzone status would benefit greatly the communities of Houston and Texas City, and the State of Texas through the following: (1) the expansion of an existing $30 million annual payroll in Houston and Texas City; (2) the expansion of an economic impact of over $2 billion per year in Texas; (3) the increase of exports consisting of 6.3 million barrels of petroleum to over 12 million barrels, valued at $440 million per year; (4) the reduction of the United States' balance of trade through increased exports; (5) preservation of two United States refining operations, thereby preventing losses resulting from a shutdown, including the loss of over 4,488 direct and indirect jobs; and (6) stimulation of growth in the United States refining industry with approximately $36 million in capital improvements at the two refineries. (R. 1 at 2–3.)

Initially, the application generated favorable public comment from a number of organizations, companies, and government officials. *(See* R. 3–5, 7–9, 11–12.) In early 1991, however, officials from three local taxing authorities—Texas City, Galveston County, and the Texas City Independent School District—contacted the Board to register concern regarding the Texas City site because of the potential loss of *ad valorem* tax revenue. *(See* R. 21–24.) The local governmental entities further stated they had not been notified that an application was in process. *(See* R. 21, 23, 24.) All three entities requested an opportunity to be heard in opposition to plaintiffs' application. *(See* R. 21–24.)

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[2] In *Phibro I*, this Court held, in part, that "[b]ecause Congress has authorized [foreign-trade zones] for the express purpose of encouraging exports, the Court concludes that its residual jurisdiction over import-related matters under [28 U.S.C.] § 1581(i) does not apply to decisions by the [Board] denying a subzone application." *Phibro I*, 17 CIT at ____, 822 F. Supp. at 764.

[3] In *Conoco II*, the CAFC "concluded that, as applied to *[Conoco]*, the FTZA is a statute 'providing for revenue from imports.' Thus, we reject the conclusion of the Court of International Trade in *[Phibro I]* that the FTZA *per se* governs export transactions only." *Conoco II*, 12 Fed. Cir. (T) at ____, 18 F.3d at 1590 n.24 (citing *Luggage and Leather Goods Mfrs. of Am. v. United States*, 7 CIT 258, 265, 588 F. Supp. 1413, 1419 (1984)).

[4] Plaintiff Phibro Energy USA, Inc. was known as Hill Petroleum Corporation at the time of the application.

Due to the lack of local input, the Board considered, and included in the administrative record, submissions by local authorities in opposition to a subzone grant covering the Texas City site. *(See* R. 66; R. 110 at 4–5.) These objections were based on the harmful consequences resulting from the projected loss of *ad valorem* tax revenues and "the precedent it would set within the County for other such proposals." (R. 110 at 8; *see* R. 83.) In 1989, the Texas City refinery paid over $600,000 in *ad valorem* taxes. (R. 110 at 4.) According to the Chief Appraiser for Galveston County, estimates indicated creation of a Texas City subzone would result in a tax exemption of up to $60 million in appraised value, causing "a loss in revenue on the order of $1,000,000 to the entities involved. The school district alone could lose over $500,000." (R. 83 at 1.) Furthermore, the appraiser estimated, "[i]f Foreign Trade Zone status is conferred on other potential applicants, as much as $400,000,000 of the local tax base could be exposed to total exemption." *(Id.)*

The Board approved the application for plaintiffs' Houston refinery, but denied the application for plaintiffs' Texas City refinery. *Application of the Port of Houston Authority,* 56 Fed. Reg. 67,058 (U.S. Foreign-Trade Zones Bd. 1991) (resolution and order). Plaintiffs then commenced this action.

CONTENTIONS OF THE PARTIES

Plaintiffs submit two major contentions in opposition to the Board's decision. First, plaintiffs contend the Board acted arbitrarily, capriciously and abused its discretion when it ignored the applicable statutory criteria for granting or denying subzone status. According to plaintiffs, the FTZA does not empower the Board to use a public interest test in its determinations. Instead, plaintiffs argue, the plain language of 19 U.S.C. § 81g requires the Board to grant a subzone application meeting § 81g's criteria of suitable location and sufficient facilities.[5] Plaintiffs further argue the Board's consideration of the potential loss of *ad valorem* tax revenue as a basis for denying plaintiffs' application was contrary to the statute because Congress actually disapproved such a basis when it amended the FTZA in 1984. In enacting 19 U.S.C. § 81*o*(e), plaintiffs argue, Congress sought to "'eliminate such tax concerns from among the factors to be considered by potential FTZ operators or users.'" (Pls.' Br. in Supp. of Mot. for J. on Agency R. at 14–15 (quoting H.R. Rep. No. 267, 98th Cong., 1st Sess. 35 (1983)) (plaintiffs' emphasis deleted).)[6] As additional support for plaintiffs' contention the Board acted arbitrarily, capri-

[5] 19 U.S.C. § 81g reads in its entirety as follows:

If the Board finds that the proposed plans and location are suitable for the accomplishment of the purpose of a foreign trade zone under this chapter, and that the facilities and appurtenances which it is proposed to provide are sufficient it shall make the grant.

19 U.S.C. § 81g (1988).

[6] 19 U.S.C. § 81o(e) provides:

(e) Exemption from State and local ad valorem taxation of tangible personal property

Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, shall be exempt from State and local ad valorem taxation.

19 U.S.C. § 81o(e) (1988).

ciously, and abused its discretion, plaintiffs cite to Article I, Sections 8 and 10 of the United States Constitution to argue the Board's basis for denying the subzone application was contrary to constitutional policy.[7]

Plaintiffs second major contention is that the Board's action had no rational basis in fact. Plaintiffs claim even if the Board could properly disapprove a subzone application to promote state *ad valorem* taxation, no evidence here demonstrated a subzone grant would substantially impact the complaining localities' *ad valorem* tax revenues. In 1989, plaintiffs maintain, the total tax revenues from *ad valorem* taxation at the Texas City refinery amounted to $686,709, or only 0.73% of the tax revenues of the three objecting entities. Furthermore, plaintiffs argue, the speculation concerning future "unidentified hypothetical applicants" was just that—mere speculation, which can neither substitute for facts in agency adjudication nor satisfy the rationality requirement for administrative decision making. *(Id.* at 19.)

Defendants contend the Board's denial of the application as not in the public interest was consistent with the FTZA and was not arbitrary, capricious, or an abuse of discretion. In so doing, defendants advance two major arguments. First, defendants argue the Board's public interest test was derived from and is consistent with the FTZA. Defendants claim 19 U.S.C. § 81*o*(c) gives the Board explicit authority to restrict or condition activities to protect the public interest.[8] Although the Act does not define "public interest," defendants assert "the phrase is plainly broad enough to encompass the concerns of local elected officials with respect to the projected economic impact of a proposed subzone." (Defs.' Opp'n to Pls.' M. at 17.) Furthermore, defendants maintain, the Board's interpretation of the public interest test in this case does not contradict the 1984 amendments to the FTZA, but rather is consistent with congressional intent that *established* foreign-trade zones be exempt from *ad valorem* taxation. Moreover, defendants assert, the Board has applied the public interest test consistently in previous cases and Congress has been aware of that consistent application.

Defendants' second major argument is that the administrative record supports the Board's determination. Defendants maintain the Board performed a detailed analysis of the evidence presented by all parties prior to rendering a decision. After considering all of the evidence of record, defendants claim, the Board properly concluded plaintiffs had failed to meet the burden "of showing that the proposal would result in a significant public benefit and was in the public interest." *(Id.* at 24.)

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[7] Article 1, Section 8 of the Constitution provides in part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States * * *." U.S. Const. art. I, § 8. Article 1, Section 10 of the Constitution states the following in relevant part: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *." U.S. Const. art. I, § 10.

[8] 19 U.S.C. § 81*o*(c) reads in its entirety as follows:

(c) Exclusion from zone of goods or process of treatment

The Board may at any time order the exclusion from the zone of any goods or process of treatment that in its judgment is detrimental to the public interest, health, or safety.

19 U.S.C. § 81*o*(c) (1988).

Amici contend the Board's decision was not arbitrary and capricious, an abuse of discretion, contrary to law, or unsupported by substantial evidence. In so doing, amici argue the Board appropriately considered lost tax revenue in its deliberation. The deliberation the Board undertakes, amici argue, "is a balance of equities in which a judgment as to *net economic effect* must be reached." (Amicus Curiae Br. in Opp'n to M. for J. on Agency R. at 2.) Amici contend that here, however, plaintiffs "fall short of the net assessment required for demonstration of public interest." *(Id.)* Additionally, amici argue plaintiffs failed to consult adequately local authorities prior to the submission of plaintiffs' application to the Board. Amici maintain, furthermore, that loss of local tax revenue occasioned by a grant of subzone status would indeed be substantial.

Amici also contend plaintiffs are not real parties in interest. Amici argue that under the FTZA plaintiffs have no legal rights against the government and, in fact, would not have acquired legal rights even if the subzone application had been granted. While amici admit plaintiffs maintain a direct financial interest in both denial of the subzone application and the outcome of this action, amici claim plaintiffs' financial interest is insufficient to confer the necessary legal rights. This shortcoming, amici contend, is fatal to plaintiffs' ability to maintain this suit because "[t]here must be some legal right to be enforced in order to be the real party in interest." (Am. Amicus Curiae Br. at 3.) Amici argue the true party in interest in this proceeding is the Port of Houston Authority as the applicant for the subzone and the party who would be charged with maintenance and administration of the subzone had the Board granted the Port of Houston Authority's application. Accordingly, amici ask this Court to dismiss this action pursuant to U.S. CIT R. 17(a) if, after a reasonable time under the circumstances, the Port of Houston Authority does not join this action.

Plaintiffs respond to amici's procedural argument by claiming that plaintiffs are persons "'adversely affected or aggrieved by agency action'" under the Administrative Procedure Act (APA). (Pls.' Resp. to Am. Amicus Br. at 2 (quoting 5 U.S.C. § 702).) Because a person qualifies as a real party in interest when a statute gives that person the right to bring suit, plaintiffs contend, plaintiffs *"are* the real parties in interest." *(Id.* (citing 6A Charles A. Wright *et. al., Federal Practice and Procedure* § 1550 at 384 (1990) (Wright & Miller)).) In fact, plaintiffs assert, the right of "aggrieved" persons who were not parties to an application to challenge Board orders on applications for subzones is a long-recognized right.

Plaintiffs further respond to amici's procedural arguments by drawing comparisons to Fed. R. Civ. P. 17. A particular goal of Fed. R. Civ. P. 17, plaintiffs argue, is to assure nominal parties are not used to manipulate citizenship in order to create or avoid federal jurisdiction, a situation not at issue here. Furthermore, plaintiffs contend, Fed. R. Civ. P. 17

motions rest largely in judicial discretion and should be brought with reasonable promptness.

STANDARD OF REVIEW

In *Conoco, Inc. v. United States,* 18 CIT ____, 855 F. Supp. 1306 (1994) *(Conoco III)*, this Court set forth the standard of review applicable to decisions of the Board. *See also Conoco, Inc. v. United States,* 19 CIT ____, Slip Op. 95–62 at 11–12 (Apr. 13, 1995) *(Conoco IV)* (reiterating the standard of review set forth in *Conoco III)*. Based on the standards prescribed by section 706 of the APA, this Court must first determine "'whether the [Board] acted within the scope of [its] authority' in order to determine whether the Board's action violated § 706(2)(C)." *Conoco III,* 18 CIT at ____, 855 F. Supp. at 1311 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971) (further citation omitted)). If this Court determines the Board did act within the scope of its authority, "the Court may then consider whether the Board's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' in violation of § 706(2)(A)." *Id.* at ____, 855 F. Supp. at 1311 (quoting 5 U.S.C. § 706(2)(A) (1988) and citing *Citizens to Preserve Overton Park,* 401 U.S. at 416).

DISCUSSION

A. *Plaintiffs' Eligibility to Sue:*

Amici contend plaintiffs are not the real parties in interest. The crux of amici's argument is that, in order to be a real party in interest, one must possess some enforceable legal right. Because plaintiffs have no legal right directly against the federal government, amici argue, plaintiffs are not the real parties in interest.

Under section 702 of the APA, a "[p]erson suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1988). Plaintiffs contend they qualify as "adversely affected or aggrieved by agency action." The statutory provisions of the FTZA do not speak to challenges to Board disapprovals of subzone applications. This silence, however, is not fatal to plaintiffs' ability to bring this action. Even though the FTZA is statutorily silent on challenges to Board disapprovals of subzone applications, the Court finds that once the application requesting subzone status for plaintiffs' refinery was submitted on plaintiffs' behalf,[9] plaintiffs became eligible under section 702 to seek judicial review of whether the Board's determination was made in a manner consistent with the Board's authority under the FTZA and not arbitrarily or capriciously.

In this analysis, the Court notes that

> [i]n the realm of public law, when governmental action is attacked on the ground that it violates private rights * * * the question whether the challenger is a proper party plaintiff to assert the

[9] The Court does not address the question, not at issue here, whether plaintiffs could seek judicial review if the Port of Houston Authority had refused to submit the application.

> claim rarely is analyzed in terms of real party in interest * * *. Instead, the courts have tended to rely on the judgemade doctrine of standing to sue. To the extent that standing in this context is understood to mean that the litigant actually must be injured by the governmental action that he is assailing, then it closely resembles the notion of real party in interest under Rule 17(a), inasmuch as both terms are used to designate a plaintiff who possesses a sufficient interest in the action to entitle him to be heard on the merits.

6A Wright & Miller, § 1542 at 329–30 (footnotes omitted); *see New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 465, *cert. denied*, 469 U.S. 1019 (1984).[10] Furthermore, section 702, if applicable, is a statute interpreted as giving standing to challenge agency action. *See, e.g., Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 937 (Fed. Cir. 1991) ("Appellants invoke section 702 of the APA which gives standing to any person 'adversely affected or aggrieved by an agency action within the meaning of a relevant statute.'") (quoting section 702 of the APA and citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)); *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 502 (DC Cir. 1994) (explaining section 702 "provides standing to a person 'adversely affected or aggrieved by agency action within the meaning of a relevant statute'"). Accordingly, this Court will analyze it as such.[11]

In *Armco Steel Corp. v. Stans*, 431 F.2d 779 (2nd Cir. 1970), the Second Circuit reviewed a *domestic steel producer's* appeal challenging the legality of action taken by the Board in granting authorization to establish a foreign-trade subzone. As a preliminary issue, the court addressed

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[10] In *New Orleans Public Service, Inc.*, the court observed as follows:

> As a recognized text has observed, [the] zone of interest standing test in public law cases "is somewhat analogous to the Rule 17(a) standard that the party possess a substantive right under the applicable law * * *." In a sense, a party within the zone of interests protected by a statute may possess a type of substantive right not to have the statute violated.

New Orleans Pub. Serv., Inc., 732 F.2d at 465 (quoting Wright & Miller). For a discussion of the "zone of interests" test in standing doctrine, see *infra* pp. 15–18.

[11] The Court recognizes that although the principles of real party in interest and standing bear resemblance, "several * * * elements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a)." 6A Wright & Miller, § 1542 at 330 (footnote omitted). However, even if the Court forces the issue of plaintiffs' eligibility to challenge this agency action into a strict real party in interest analysis, the Court still finds plaintiffs eligible to bring suit.

The Court's rules provide in relevant part:

> Every action shall be prosecuted in the name of the real party in interest * * *. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

U.S. CIT R. 17(a) (1988). To determine whether a plaintiff is a real party in interest, the Court must determine whether the plaintiff "is the entity which under substantive law has the right sought to be enforced." *South African Marine Corp., Ltd. v. United States*, 10 CIT 415, 419, 640 F. Supp. 247, 251 (1986) (citing 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 17.07 at 17–65 (2nd ed. 1985)); *see id.* at 422, 640 F. Supp. at 254 ("'The meaning and object of the real party in interest principle embodied in Rule 17 is that the action must be brought by a person who possesses the right to enforce the claim and who has a significant interest in the litigation.'") (quoting *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974)). Here, plaintiffs seek judicial review of the Board's disapproval of the subzone application made on plaintiffs' behalf. Specifically, plaintiffs seek to enforce the right to have a submitted subzone application reviewed in manner consistent with the Board's authority under the statute, and not in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(C), (A).

Although the FTZA's statutory provisions are silent as to who may challenge a Board disapproval of a subzone application, the FTZA as a whole, the purpose and scheme of the FTZA, indicates plaintiffs qualify as real parties in interest. As the Court discusses *infra*, it appears a major purpose of the FTZA is to strengthen the foreign trade of the United States and to benefit domestic business in the process. Furthermore, the Court sees nothing in the FTZA indicating congressional intent to prohibit parties such as plaintiffs here from seeking to enforce the right to have an application that was submitted on their behalf reviewed in accordance with the FTZA.

the question of whether the domestic steel producer had standing to sue. *Armco,* 431 F.2d at 784. Noting the United States Supreme Court's decision in *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), the court found the domestic producer had standing. The court explained the domestic producer was

> not only complaining of economic injury to itself from unlawful competition, but [was] invoking for itself a "statutory aid to standing" because the tariff laws are demonstrably intended to protect the competitive interest of the entire class of domestic steel producers, a class of which it is a member.

Id.

Here, as in *Armco,* plaintiffs are proper parties to maintain this action. Under current standing doctrine, "[f]irst, the plaintiff must have suffered 'an injury in fact' * * *. Second, there must be a causal connection between the injury and the conduct complained of * * *. Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992) (citations omitted). The Court has no difficulty in determining plaintiffs satisfy the requirements of personal injury, causation, and effective relief. In addition to these standing requirements, however, prudential considerations require plaintiffs be "within the 'zone of interests' a particular statute addresses." *Quigg,* 932 F.2d at 925 (quoting *Air Courier Conference of Am. v. Am. Postal Workers Union,* 111 S. Ct. 913, 917 (1991) and cases cited therein, including *Ass'n of Data Processing Serv. Orgs.,* 397 U.S. at 153). "The 'zone of interest' test is a guide to determine whether a particular plaintiff may bring an action pursuant to the [APA, 5 U.S.C. § 702], to complain of a particular agency action." *Schering Corp. v. FDA,* No. 94–5366, 1995 U.S. App. LEXIS 7566, at *14, 1995 WL 145074, at *4 (3rd Cir. Apr. 3, 1995) (citing *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388, 399 (1987)) (footnote omitted). Thus, plaintiffs must fall within the "zone of interests" the FTZA addresses to have standing. *See Quigg,* 932 F.2d at 937 (explaining that the statute whose violation forms the basis of the complaint is the relevant statute for the "zone of interests" inquiry because "to fall within the 'zone of interests' protected by section 702, it is necessary to be within the 'zone of interests' addressed by a 'relevant statute'").

According to the 1934 House Report, the FTZA was enacted to "encourage and revive the foreign trade of the United States by permitting the establishment in the United States of foreign-trade zones." H.R. Rep. No. 1521, 78th Cong., 2d Sess. 1 (1934). The House Report also quotes a letter from the President of the Chamber of Commerce of the United States to the Chairman of the Subcommittee on Foreign Trade Zones that states in part, "It is believed that a free zone is a part of the equipment of a country for doing a diversified international trading business which American business men ought to have made available to them." *Id.* at 2. Similarly, the Senate Report discussing the 1950 amend-

ment to the FTZA, which eliminated provisions excluding manufacturing and exhibiting in zones, contains an excerpt from a letter from the Secretary of Commerce to the Committee on Ways and Means that states in part, "The existence of the present trade zones has done much to stimulate American commerce both import and export. *The proposed permission of manufacturing in the zones is expected further to assist American business* by enabling it to manufacture certain types of products for export under minimum cost conditions." S. Rep. No. 1107, 81st Cong., 1st Sess. (1949), *reprinted in* 1950 U.S. Code Cong. Serv. 2533, 2534 (emphasis added).

This Court finds the concern of Congress to aid domestic business through zone grants in the process of strengthening United States' foreign trade is evident. *Cf. Chrysler Motors Corp. v. United States,* 14 CIT 807, 814, 755 F. Supp. 388, 394 (1990) ("When Congress first made provision for foreign-trade zones, it was perceived that these zones would relieve businesses from the burden of paying duties on imported merchandise and then having to seek drawback upon exportation, or employing bonds or bonded warehouses for export duties.") (citing H.R. Rep. No. 1521 at 2–3), *aff'd,* 10 Fed. Cir. (T) ____, 945 F.2d 1187 (1991); *see also A.T. Cross Co. v. Sunil Trading Corp.,* 467 F. Supp. 47 (S.D.N.Y. 1979).[12] Furthermore, no direction from Congress exists indicating an authority that physically submits a subzone application on behalf of another must be the party to bring an action challenging disapproval. Accordingly, this Court finds plaintiffs' interests fall within the "zone of interests" sought to be protected by the FTZA. Therefore, this Court finds plaintiffs have standing to bring this action.

The Court notes, furthermore, that based on *Conoco II,* this Court is not dissuaded from its decision simply because 19 U.S.C. § 81r(c) provides an explicit provision under which zone grantees may appeal zone revocations. *See* 19 U.S.C. § 81r(c) (1988) (providing that a Board order revoking a previously granted zone is final, "unless within ninety days after its service the grantee appeals to the court of appeals for the circuit in which the zone is located"). In *Conoco II,* the CAFC addressed the government's argument, raised below, that because the FTZA specifically provides for appeals from zone revocations but does not provide for judicial review of other Board actions, no judicial review was available for other Board actions. *Conoco II,* 12 Fed. Cir. (T) at ____, 18 F.3d at 1584–85. Despite the presence of § 81r(c), however, the CAFC had "no difficulty in holding that the orders of the [Board], absent a clear and unequivocal expression of Congressional intent to the contrary, are generally subject to judicial review in accordance with established prin-

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[12] In *A.T. Cross Co.,* the court explained that

> [t]he legislative intent behind the [FTZA] was two-fold. First, the intent was to facilitate exports from the United States of goods originating in foreign ports by not treating them as imports subject to United States taxes on import. In addition, it was intended to admit foreign goods into the United States *so that United States citizens could be involved and, consequently, financially profit from* the breaking down, repacking and relabeling of the goods as well as their combination with American goods.

A.T. Cross Co., 467 F. Supp. at 50.

ciples of law." *Id.* at ____, 18 F.3d at 1585 (footnote omitted). The CAFC explained that 19 U.S.C. § 81r

> is the only statement in the statute of Congressional intent regarding judicial review of Board orders. The statute leaves unsaid what is to be done with orders of the Board other than orders of revocation. The most that can be said for the statute is that, if these other orders are judicially reviewable, jurisdiction-granting authority must be located in other legislation. The least that can be said for the statute is that it falls far short of a clear declaration of Congressional intent regarding reviewability of these other orders.

Id. at ____, 18 F.3d at 1585. Simply because Congress specified a particular type of review for revocations was not inconsistent with this conclusion. "Congress may well have simply intended that revocation orders, because of their impact on already established rights of the parties, be reviewed by direct appeal to the appropriate courts of appeal." *Id.* at ____, 18 F.3d at 1585.

B. *The Foreign-Trade Zones Board's Decision:*

In *Conoco III,* this Court held it could not review a Board decision when the Board's order did "not contain an understandable basis that would permit the Court to determine whether the Board acted within the scope of its authority." *Conoco III,* 18 CIT at ____, 855 F. Supp. at 1311.[13] In the present case, as in *Conoco III,* the Board's notice announcing its decision to disapprove the Texas City subzone does not indicate on what basis the Board rendered its decision. *See Conoco III,* 18 CIT at ____, 855 F. Supp. at 1311–12. Although the notice indicates the Board determined a grant of subzone status for the Texas City site would not meet the FTZA's requirements "because approval of that part of the proposal would not be in the public interest,"[14] the notice does not explain in what manner approval of the Texas City subzone would not be in the public interest or the factors the Board considered in rendering that determination.

The administrative record helps the Court surmise the Board's bases for its determination. The Board's own decision to deny the Texas City subzone, however, provides no clarification. As this Court discussed in *Conoco III,* this type of

> lack of clarity in the Board's decision [ ] prevents the Court from discerning the path the Board followed * * * and improperly requires the Court to "supply a reasoned basis for the [Board's] action that the [Board] itself has not given * * *." *[Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 285–86 (1974).] While the Court may surmise upon what grounds the Board decided to impose the conditions, the Board and not the

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[13] If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947) (quoted in *Conoco III,* 18 CIT at ___, 855 F. Supp. at 1311).

[14] *Application of the Port of Houston Authority,* 56 Fed. Reg. 67,058 (U.S. Foreign-Trade Zones Bd. 1991) (resolution and order).

> Court bears the burden of "articulat[ing] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *[Motor Vehicle Mfrs. Ass'n v. State Farm Mut.,* 463 U.S. 29, 43 (1983) (quotation and citation omitted).]

Conoco III, 18 CIT at ____, 855 F. Supp. at 1312. Because the Board has not set forth adequately the basis for disapproving the Texas City subzone, the Court finds it cannot ascertain whether the Board acted in conformity with its statutory authority pursuant to 5 U.S.C. § 706(2)(C), or whether the Board's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). *See Conoco III,* 18 CIT at ____, 855 F. Supp. at 1312. Accordingly, the Court remands this action to the Board so that it may fully explain the rationale underlying its decision to deny that portion of plaintiffs' application requesting subzone status for the Texas City site.

CONCLUSION

The Court holds plaintiffs may properly bring this action. The Court further holds the Board failed to articulate the basis upon which it decided to deny that portion of plaintiffs' application requesting subzone status for the Texas City, Texas site. The Court remands this action to the Board so that it may fully explain the rationale underlying that disapproval. On remand, in addition to whatever matters the Board deems it appropriate to address, the Board shall explain whether and in what manner approval of plaintiffs' request for subzone status for the Texas City site would not serve the public interest. In so doing, the Board shall explain all factors considered in reaching its determination.

(Slip Op. 95–87)

TAKASHIMA U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–01–00052

Defendant moves to dismiss this case for lack of jurisdiction pursuant to 28 U.S.C. § 2636(a)(1) (1988). Defendant alleges this action was commenced more than 180 days after the notices of denial of protests were mailed and therefore the Court lacks jurisdiction. Plaintiff opposes defendant's motion and argues plaintiff commenced this action within the statutory time period and therefore defendant's motion should be denied.

Held: The evidence bearing on whether this Court has subject matter jurisdiction is inconclusive and therefore a determination of the Court's jurisdiction is better left for trial. The factual issues impacting on the question of jurisdiction are so intertwined with the merits of this action that granting a motion to dismiss would be inappropriate at this time. Defendant's motion to dismiss for lack of subject matter jurisdiction is denied. Defendant shall answer the complaint within 30 days after which time this matter will be set for trial.

(Dated May 9, 1995)

Politis, Pollack & Doram (Elon A. Pollack and *John N. Politis),* for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(John J. Mahon),* for defendant.

OPINION

CARMAN, *Judge:* Plaintiff, Takashima U.S.A., Inc., challenges the classification and liquidation of its imported merchandise, plastic sheeting in continuous lengths, consisting of woven polyethylene fabric, laminated on both surfaces with non-transparent polyethylene plastic. Defendant moves to dismiss this action for lack of jurisdiction because, defendant argues, plaintiff commenced this action more than 180 days after the United States Customs Service (Customs) mailed the notices of denial of protests. The United States Court of International Trade (CIT or Court) has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1988).[1]

BACKGROUND

Plaintiff imported the eight entries at issue here between December 14, 1983, and November 6, 1984. The entries were liquidated on various dates in 1984 and plaintiff's protests followed in 1985. For purposes of simplicity, the following chart lists the eight entries, the protest numbers, and the pertinent dates not in dispute:

Date of entry	*Entry No.*	*Protest No.*	*Date of liquidation*	*Date protest filed*
10–19–84	85–123523	2704–5–000907	11–30–84	02–25–85
12–14–83	84–477733	2704–5–001445	02–03–84	03–28–85
12–14–83	84–477734	2704–5–001446	02–03–84	03–28–85
11–06–84	84–478090	2704–5–001447	03–09–84	03–28–85
02–05–84	84–478471	2704–5–001448	03–16–84	03–28–85
03–07–84	84–479060	2704–5–001456	04–27–84	03–28–85
06–05–84	84–498693	2704–5–001457	07–27–84	03–28–85
05–10–84	84–498287	2704–5–001458	08–03–84	03–28–85

The record is not clear when Customs claims it denied the protests in question, as defendant's papers reflect two different dates for some of the protests:

Protest No.	*Date protest denied*	
	as per Def.'s Mot. to Dismiss	*as per Def.'s Reply Br.*
2704–5–000907	08–07–87	08–07–87
2704–5–001445	01–25–88	12–05–88
2704–5–001446	01–25–88	12–05–88
2704–5–001447	01–25–88	12–05–88
2704–5–001448	01–25–88	12–05–88
2704–5–001456	01–24–88	12–05–88
2704–5–001457	01–25–88	12–05–88
2704–5–001458	03–28–86	03–28–86

[1] Whether the Court has jurisdiction is the threshold issue here; however, it is firmly established that the Court has the power to determine its subject matter jurisdiction. *See* 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3536 at 535 (2nd ed. 1984 & Supp. 1995) ("If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue.") (footnote citing cases omitted).

CONTENTIONS OF THE PARTIES

Plaintiff maintains it never received the notices of denial of protests that Customs claims to have sent. In June 1992, plaintiff contends, its records reflected that the protests at issue here were still pending. After contacting Customs concerning the pending protests, plaintiff wrote Customs requesting accelerated disposition of the protests. Plaintiff argues Customs failed to allow or deny the protests within thirty days of plaintiff's request and thus, the protests were deemed denied on December 24, 1992. (Pl.'s Opp'n to Def.'s Mot. to Dismiss (Pl.'s Br.) at 1–2.) *See* 19 C.F.R. § 174.22(d) (1992). Plaintiff filed a summons commencing this action on January 22, 1993.

To support its claim that it did not receive the notices of denial, plaintiff submitted several affidavits which purport to describe the practice of handling incoming mail at Mandel & Grunfeld (M&G)[2] and the maintenance of the law firm's ledger where denied protests were recorded. A former M&G partner stated that after dissolution of M&G, "GDL&S designated two attorneys * * * to open all mail received by the firms, and to direct the same to the appropriate recipient in the firms." (Florsheim Aff. ¶ 5.) "In the case of all protests (M&G and GDL&S), both denied and approved, it was (and still is) the established practice to deliver the same to Kenneth Rich, GDL&S's Customs Specialist." *(Id.)* One of the attorneys responsible for opening the mail affirmed that denied protests were delivered to Mr. Rich who forwarded them to the paralegal assistant for entry in the appropriate summons log book. (Klestadt Aff. ¶¶ 2, 4.) Plaintiff produced the affidavit of a clerical assistant employed by GDL&S from November 1985 to October 1987, who stated that after receiving denied protests from Mr. Rich or his assistant, she entered information in the appropriate log book. (Watson Aff. ¶¶ 1, 3.) Plaintiff conducted a search of the appropriate M&G logs in New York and Los Angeles and failed to uncover any notation M&G had received the notices of denial. (Pl.'s Br. at 2, 6–7.)

Plaintiff argues the non-receipt of the notices of denied protests raises a presumption that the notices were not mailed by Customs. *(Id.* at 4 (citation omitted).) Because the "evidence demonstrates that plaintiff did not receive any notices of denial," *(id.* at 7), plaintiff concludes, "the burden now shifts to the government to establish by clear and convincing evidence the fact of proper mailing," *(id.* at 9).

Defendant alleges the protests in this case were denied during the period March 28, 1986, through January 25, 1988, or December 5, 1988.[3] (Def.'s Mot. to Dismiss at 1.) Because this action commenced considerably after the 180-day period provided by statute, defendant argues, "the summons was untimely filed, and this court lacks jurisdiction over the action." *(Id.)*

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[2] The protests at issue here were filed by M&G, which dissolved on January 14, 1985, at which time several M&G attorneys became associated with Grunfeld, Desiderio, Lebowitz & Silverman (GDL&S).

[3] The discrepancy in defendant's papers regarding some of the dates the protests were allegedly denied is summarized *supra* p. 3.

Defendant underscores the well-established presumption of regularity enjoyed by government officials in the performance of their lawful duties. (Def.'s Reply Br. at 2 (citations omitted).) Coupled with this presumption, defendant argues, is the evidentiary presumption that "proof of mailing of a notice pursuant to standard office procedures creates a presumption that the notice was received." *(Id.* at 3 (citations omitted).) Therefore, defendant reasons, the notices of denial of the protests at issue here are presumed to have been issued and duly mailed and delivered to M&G in the regular course of mail delivery.

In response to plaintiff's arguments of non-receipt, defendant challenges "plaintiff's reliance upon the accuracy of the office practices of Mandel & Grunfeld [as] misplaced and not dispositive of the issue of non-receipt." *(Id.* at 4–5.) Defendant also contests the accuracy of plaintiff's log books by pointing out several errors and omissions regarding the disposition of several protests listed in the sample pages of the log books produced during discovery. *(Id.* at 8–10.) Taken together, defendant contends "plaintiff's evidence of proof of non-receipt of the notices of denial of the eight protests in issue here is insufficient and fails to shift the burden of proving mailing to the Government." *(Id.* at 13.)

DISCUSSION

A. *Subject Matter Jurisdiction:*

A civil action challenging the denial of a protest is barred unless commenced within the time provided by statute. The applicable statute provides:

> **§ 2636 Time for commencement of action.**
>
> (a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—
>
> (1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act. * * *

28 U.S.C. § 2636(a)(1) (1988). The statute provides a hard and fast deadline that, if not met, leaves the Court without jurisdiction to hear the case. *See Neptune Microfloc, Inc. v. United States,* 8 CIT 353, 355 (1984) ("The 180-day filing rule is an inflexible jurisdictional requirement.").

The Court construes defendant's pending motion as a U.S. CIT R. 12(b)(1) motion to dismiss for lack of jurisdiction over the subject matter. The Court of Appeals for the Federal Circuit has laid out a concise analysis to follow in deciding Rule 12(b)(1) motions:

> If a Rule 12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations—that is, the movant presents a "facial" attack on the pleading—then those allegations are taken as true and construed in a light most favorable to the complainant* * * .

> If the Rule 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction, however, the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction. In such a case, the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion. All other facts underlying the controverted jurisdictional allegations are in dispute and are subject to fact-finding by the district court. In establishing the predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony.

Cedars-Sinai Medical Ctr. v. Watkins, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993) (footnote and citations omitted), *cert. denied*, 114 S. Ct. 2738 (1994). Defendant has not filed an answer to the complaint and its pending motion does not appear to attack the sufficiency of the allegations in plaintiff's pleadings. Instead, defendant asserts plaintiff's action is barred as untimely. In effect, defendant challenges the factual basis of plaintiff's allegations of jurisdiction—that is, plaintiff's assertion that this action is timely and is properly before the Court.

The burden of establishing jurisdiction lies with the party seeking to invoke the court's jurisdiction, in this case, the plaintiff. *Old Republic Ins. Co. v. United States*, 14 CIT 377, 379, 741 F. Supp. 1570, 1573 (1990) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)). The Court must be satisfied plaintiff has met its burden by setting forth sufficient evidence establishing the Court's subject matter jurisdiction. If, after a review of the pleadings and extrinsic evidence, any conceivable doubt remains whether this Court has jurisdiction to hear this action, the Court will refrain from granting defendant's motion to dismiss. As the Court of Appeals aptly stated, a "complaint should not be dismissed unless it is beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (discussing motion to dismiss for lack of subject matter jurisdiction and motion to dismiss for failure to state a cause of action and citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

B. *Plaintiff's Evidence Asserting Subject Matter Jurisdiction:*

Plaintiff maintains that after filing a letter with Customs requesting accelerated disposition of the protests pursuant to 19 C.F.R. § 174.22, the protests were deemed denied thirty days thereafter. (Pl.'s Br. at 2.) To prevail in its argument plaintiff must surmount the presumption that Customs duly mailed the notices of denial of protests thereby triggering the start of the 180-day limitation period. *See* 28 U.S.C. § 2636(a)(1).

A presumption of regularity attaches to the actions and conduct of government officials in the performance of their lawfully executed duties. *See Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993) ("'[T]here is a presumption that public officers perform their

duties correctly, fairly, in good faith, and in accordance with the law and governing regulations * * *.'") (quoting *Parsons v. United States,* 229 Ct. Cl. 335, 339, 670 F.2d 164, 166 (1982) (citing *United States v. Chemical Found., Inc.,* 272 U.S. 1, 14–15 (1926) (other citations omitted))). Coupled with the teachings of these cases is the statutory presumption that decisions by Customs are presumed correct. *See* 28 U.S.C. § 2639(a)(1) (1988) ("[I]n any civil action commenced in the [CIT] under section 515 * * * of the Tariff Act of 1930, the decision of the * * * administering authority * * * is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision."). Thus, the burden is on the plaintiff in this action to show evidence rebutting the presumption that Customs mailed the notices of denial of protests. *See Enron Oil Trading and Transp. Co. v. United States,* 15 CIT 511, 512 (1991) ("When notice must be given by [Customs], the burden of going forward with evidence initially falls upon the plaintiff due to the presumption of regularity * * *.") (citing *Intra-Mar Shipping Corp. v. United States,* 66 Cust. Ct. 3, 6, C.D. 4160 (1971)), *vacated on other grounds,* 11 Fed. Cir. (T) ___, 988 F.2d 130 (1993). Plaintiff has chosen to put forth evidence of non-receipt of the notices to meet its burden. If plaintiff meets this burden, the onus shifts to Customs to proffer evidence of mailing. *See id.* ("When the plaintiff has met the initial requirement of negating the presumed delivery by evidence of non-receipt, non-issuance or non-delivery of the notice, the burden falls upon the government to establish that notice was given.") (citing *Intra-Mar,* 66 Cust. Ct. at 6).

The record before the Court is inconclusive as to whether plaintiff has put forth sufficient evidence showing non-receipt of the notices. For example, there are conflicting offerings of proof concerning who was responsible for handling the incoming mail at M&G[4] and how Customs was notified when the law firm moved and changed its address.[5] Additionally, there appears to be some variance in plaintiff's evidence regarding who was responsible for making entries in the logs after notices of denial were received.[6]

The Court is mindful of its obligation to determine whether subject matter jurisdiction exists. *See Dou Yee Enterprises (S) PTE, Ltd. v.*

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[4] The supervisor in charge of the Customhouse staff at M&G declared he opened all incoming mail addressed to M&G as part of a three-person team from mid-January 1985 to February 1986, and then as a member of a two-person team from d-1mi986 to November 1986. (Ronay Dep. at 39, 41; *see also* Pl.'s Br. at 4, 6–7.) In contrast, a resident partner in the New York office stated after dissolution of M&G in d-Jmianuary 1985, "GDL&S designated two attorneys * * * to open all mail received by the firms, and to direct the same to the appropriate recipient in the firms." (Florsheim Aff. ¶ 5.)

[5] One M&G partner in New York stated that after December 1, 1986, Customs was informed M&G had moved from the World Trade Center to 12 East 49th Street and subsequently, the firm received its mail, including mail from Customs, at this new address. (Silverman Dep. at 103–04.) At the M&G office in Los Angeles, however, a resident partner sent a letter to Customs dated December 12, 1986, requesting Customs "send all notices of approval, denial, refunds, increases, etc.," directly to the resident partner in Los Angeles. (Letter from Elon A. Pollack to Patricia McKane, Customs Protest Supervisor, of 12/12/86, *reprinted in* Pl.'s Br.)

[6] On one hand, the Customshouse staff supervisor stated after receiving a protest denial in the mail, he or another clerk would process the denial by logging it in the ledger, attaching it to the office copy, and giving a copy to, Mr. Florsheim, an M&G partner, for further action. (Ronay Dep. at 40–41.) On the other hand, Mr. Florsheim affirmed that the established practice for all protests was to deliver them to the GDL&S Customs Specialist, (Florsheim Aff. ¶ 5), who forwarded the denied protests to the paralegal assistant for entry in the appropriate summons log book, (Klestadt Aff. ¶ 4).

Advantek, Inc., 149 F.R.D. 185, 187 (D. Minn. 1993) ("Once the evidence is submitted, the court may 'not simply rule that there is or is not enough evidence to have a trial on the issue.' The court must decide whether it has jurisdiction.") (quoting *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (further citation omitted)). That decision, however, need not be made when the evidence presented upon which jurisdiction may be founded is inconclusive. *See Johnson v. United States*, 147 F.R.D. 91, 94 (E.D. Pa. 1993) (stating "the court may postpone a decision on the jurisdictional issue in order to allow for the presentation of evidence on that matter * * * if that which has been offered is inconclusive"). Furthermore, the factual issues surrounding the question of jurisdiction here are so intertwined with the merits of this action that it would be inappropriate to decide this matter on a motion to dismiss. *See Osborn*, 918 F.2d at 730 (declaring "when the jurisdictional issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue'" the court may refrain from determining jurisdiction until trial) (quoting *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)).

CONCLUSION

The Court holds the evidence bearing on whether this Court has subject matter jurisdiction is inconclusive and therefore a determination of the Court's jurisdiction is better left for trial. The Court further holds the factual issues impacting on the question of jurisdiction are so intertwined with the merits of this action that granting a motion to dismiss would be inappropriate at this time. Defendant's motion to dismiss for lack of subject matter jurisdiction is denied. Defendant shall answer the complaint within 30 days after which time this matter will be set for trial.

(Slip Op. 95–88)

DUTY FREE INTERNATIONAL, INC., AMMEX WAREHOUSE CO., INC., AND AMMEX TAX & DUTY FREE SHOPS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND GIT-N-GO, DEFENDANT-INTERVENOR

Court No. 91–07–00534

[Defendant's motion for judgment upon an agency record granted.]

(Decided May 12, 1995)

Tompkins & Davidson (Harvey A. Isaacs, Brian S. Goldstein, and *Laurence M. Friedman)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Susan Burnett Mansfield), Christopher Doherty,* United States Customs Service, of counsel, for defendant.

Mudge Rose Guthrie Alexander & Ferdon (Richard H. Abbey, Richard G. King) for defendant-intervenor.

MEMORANDUM OPINION

DICARLO, *Chief Judge:* Before the court is the remand determination of the United States Customs Service, issued pursuant to *Duty Free International, Inc. v. United States,* 17 CIT 1425 (1993) *(Duty Free I).* Duty Free International, Inc. (Duty Free), operators of a duty-free store near the Canadian border in New York State, seek revocation of Customs' approval of Git-N-Go's (GNG) application to establish a duty-free store in the same vicinity. Duty Free alleges that GNG's approved delivery procedures do not comply with the statutory and regulatory requirements for a bonded warehouse, and renews its motion pursuant to USCIT R. 56.1 for judgment upon an agency record. The court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (1988).

BACKGROUND

Duty Free operates a duty-free store on the East Service Road of Interstate Route 87 (I-87) in Champlain, New York. The store is immediately opposite Exit 43, the last exit and on-ramp off I-87 south of the Canadian border. A vehicle has no legal alternative but to proceed into Canada once it has entered the northbound on-ramp of I-87 from the East Service Road.

GNG's duty-free operation is an unspecified distance south of Duty Free's store on the East Service Road. Under GNG's approved delivery procedures, a bonded cartman, an employee of GNG, transports the purchased merchandise from the store to the purchaser. Delivery is then made at a point between Duty Free and GNG's stores, approximately 2/10 of a mile south of the entrance to I-87, and approximately 9/10 of a mile south of the Customs inspection building at the Port of Champlain. The cartman advises the purchaser that the merchandise is only for export into Canada, and then watches the purchaser's vehicle until it enters the northbound ramp of I-87.

Duty Free filed this action seeking to set aside Customs' approval of GNG's application to establish a duty-free bonded warehouse. Duty Free and the United States cross-moved for summary judgment. The court denied the parties' cross motions, and remanded the action to the Customs District Director to submit a more complete agency record and provide an explanation for the approval of GNG's application.

In particular, the court directed the District Director to seek internal advice from Customs Headquarters regarding: (1) whether a "practical alternative" to exiting the United States exists for a purchaser of duty-free merchandise at GNG's delivery location, where the purchaser has the ability not to depart the United States; and (2) whether a cartman's vehicle falls within the meaning of a "merchandise storage location," under 19 U.S.C. § 1555(b)(3)(F)(ii)(I) (1988). *Duty Free I,* 17 CIT at 1432–33.

Duty Free contends that GNG's delivery procedures fail to meet the statutory standard governing delivery of duty-free merchandise, as delivery does not take place "at or beyond the exit point." 19 U.S.C. § 1555(b)(3)(F)(ii)(I). Further, Duty Free contests Customs' finding

that GNG delivers merchandise to its customers at a "merchandise storage location," *id.*, and provides "reasonable assurance" of exportation, 19 U.S.C. § 1555(b)(3)(A). According to Duty Free, Customs' actions therefore must be set aside as "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994).

DISCUSSION

The court reviews an action under 19 U.S.C. § 1581(i) as provided in 5 U.S.C. § 706. Pursuant to section 706, the court shall hold unlawful and set aside Customs' decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971) (holding court must examine whether there was clear error of judgment).

Further, review of an agency decision on a motion for judgment upon an agency record mandates a careful inquiry into the facts of a case, but the search must be narrow and "plainly deferential to the determinations, findings and conclusions of the agency * * *. [T]his court is not permitted to itself weigh the evidence and substitute its judgment for that of the agency * * *." *Jeannette Sheet Glass Corp. v. United States,* 11 CIT 10, 14, 654 F. Supp. 179, 182–83 (1987).

1. Applicable Statute and Regulation:

The statutory provision governing the establishment of duty-free stores, 19 U.S.C. § 1555(b), provides that duty-free merchandise shall be delivered "at or beyond the exit point," unless Customs approved the location before enactment of the Omnibus Trade Act of 1987.[1] 19 U.S.C. § 1555(b)(3)(F)(ii).

The statute defines "exit point" as "the area in close proximity to an actual exit for departing from the customs territory." 19 U.S.C. § 1555(b)(8)(F). Customs implementing regulation further defines "exit point" as "the point at which a departing individual has *no practical alternative* to continuing on to a foreign country or to returning to Customs territory by passing through a U.S. Customs inspection facility." 19 C.F.R. § 19.35(d) (1994) (emphasis added).

---

[1] Section 1555(b), title 19, United States Code, provides in pertinent part:

(b) Duty-free sales enterprises

* * * * * * *

(3) Each duty-free sales enterprise—

(A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory;

* * * * * * *

(F) shall deliver duty-free merchandise—

(ii) in the case of a duty-free sales enterprise that is a border store—

(I) at a merchandise storage location at or beyond the exit point; or

(II) at any location approved by the Secretary before the date of enactment of the Omnibus Trade Act of 1987.

* * * * * * *

(8) For purposes of this subsection—

* * * * * * *

(F) The term "exit point" means the area in close proximity to an actual exit for departing from the customs territory * * *.

19 U.S.C. § 1555(b).

A. *"At or Beyond the Exit Point":*

Duty Free contests Customs' finding that the location of GNG's store is "at or beyond the exit point." Duty Free, while conceding that "exit point" is imprecisely defined in the statute, asserts the statutory design and the common meaning of the term indicates an area "immediately near" an *actual exit* is required. (Pl.'s Br. for J. upon Agency R. at 21.) Duty Free contends a site nearly one mile from the actual border, and nearly a quarter mile from the interstate highway entrance, which permits opportunities to return to the United States, is not "immediately near."

Duty Free further argues that this court's prior opinion, *Duty Free I*, 17 CIT 1425, and Customs' own implementing regulation, 19 C.F.R. § 19.35(d), mandate a stricter standard for exit point. These provide that an exit point must be a location at which there is "no practical alternative" but to continue to a foreign country. 19 C.F.R. § 19.35(d); *see also Duty Free I*, 17 CIT at 1429 (requiring "feasible way to assure that the goods are exported.")

Duty Free points to methods by which GNG patrons may avoid exporting their purchases. A GNG customer may turn around on the service road instead of entering the highway; alternatively, GNG's customers can drive into the parking lot of Duty Free's store—located farther down the road—turn around and exit proceeding south, without departing the United States. Nothing prevents a GNG store patron from taking such action; GNG possesses no police power to mandate exportation. Finally, Duty Free contends that GNG has not implemented procedures providing "reasonable assurance" of exportation of duty-free merchandise from the Customs territory. *See* 19 U.S.C. § 1555(b)(3)(A).

Customs recognizes the existence of these alternatives to exportation. Customs contends "[e]ven though there are possible alternatives to vehicles proceeding to Canada * * * we are of the opinion that there is a *low probability* that the duty free merchandise sold by GNG would not be exported." HQ Reply to Internal Advice Req., HQ 225176, at 4 (Feb. 23, 1994).

Accordingly, the issue before the court is whether Customs' finding of a "low probability" that duty-free merchandise would not be exported from the Customs territory conforms with regulatory and statutory mandates. These provisions require that there be "no practical alternative" to exportation of such merchandise, 19 C.F.R. § 19.35(d), that GNG's delivery location be at or beyond "the area in close proximity to an actual exit for departing from the Customs territory," 19 U.S.C. § 1555(b)(8)(F), and that the duty-free store implement procedures providing "reasonable assurance" of exportation. 19 U.S.C. § 1555(b)(3)(A).

Customs' interpretation of its regulation is permissible. Whether an alternative is "practical" depends upon how the term is defined. A "practical alternative" may be one that is available, as plaintiff con-

tends, or one that is in practice or probable, as Customs suggests. *See* Webster's Third New International Dictionary 1780 (unabr. 1981 ed.) (defining "practical" as "[2]b: being such in practice, conduct, effect, or essential character: VIRTUAL" and alternatively as "3: available, usable or valuable in practice or action: capable of being turned to use or account: USEFUL"). Under the definition employed by Customs, the low probability of an alternative's occurrence would preclude the alternative from being labeled practical.

While Customs' definition of "practical" is not one the court would adopt in the first instance, the mandates of judicial deference to an agency's construction of a regulation bind the court. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (noting agency's construction of statute need only be permissible). As the Federal Circuit has noted, "[t]o survive judicial scrutiny, an agency's construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation." *Koyo Seiko Co. v. United States*, 12 Fed. Cir. (T) ____, ____, 36 F.3d 1565, 1570 (1994) (citation omitted). The court's deference to the agency reaches its highest point where, as here, the court reviews an agency's construction of its own administrative regulation. *Udall v. Tallman*, 380 U.S. 1, 16–17 (1964). The administrative interpretation is controlling "unless plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945).

Customs' interpretation of its regulation is also consistent with the dictates of the statute. The broad language of section 1555(b) merely requires that the delivery location of duty-free merchandise be within "close proximity to an actual exit," 19 U.S.C. § 1555(b)(8)(F), and that the duty-free enterprise implement procedures providing "reasonable assurance" that duty-free merchandise will be exported from the United States. 19 U.S.C. § 1955(b)(3)(A).

Customs' approval of a location approximately 9/10ths of a mile from the actual exit is not an arbitrary or capricious interpretation or application of the statutory requirement of "close proximity." Congress did not specify a maximum distance, and this court does not find that a distance of under a mile is an impermissible interpretation of that term.

Moreover, Customs' finding—based upon its review of GNG's delivery procedures and location—that there was a "low probability" that duty-free merchandise would not be exported from the United States, satisfied the statutory requirement that GNG's delivery procedures provide "reasonable assurance" of exportation. As the term "reasonable assurance" does not equate with an absolute guarantee of exportation, Senate Comm. on Finance, Omnibus Trade Act of 1987, S. Rep. No. 71, 100th Cong., 1st Sess., pt. IV, at 231 (1987), Customs did not abuse its discretion.

The court, based upon Customs' premise that there is a "low probability" of repatriation of duty-free merchandise, upholds Customs' determination that GNG's duty-free merchandise delivery location is "at or

beyond the exit point" and that the procedures employed provide "reasonable assurance" of exportation.

B. *Customs' Finding of "Low Probability":*

Duty Free further challenges Customs' factual determination that there exists a "low probability" duty free merchandise would not be exported. Customs, in approving GNG's application, reasoned "consideration was given to the relatively short distance between [the] proposed delivery site and Exit 43, * * * that the delivery site was within view of Customs' office at the Port of Champlain, and that their delivery procedure would be comparable [to] a previously approved procedure for [Duty Free]." Internal Advice Req., Jan. 31, 1994, at 2.

Duty Free contends these considerations did not provide reasonable assurance that the duty-free merchandise sold at GNG's facility would be exported. Duty Free notes that GNG's delivery location is nearly one quarter mile from the on-ramp on a public access road. According to Duty Free, there is nothing preventing a purchaser of duty-free merchandise from passing the freeway entrance or entering Duty Free's parking lot, and turning around.

Duty Free also argues the fact that the delivery point is within view of the Customs' Port of Champlain facility is misleading, as GNG's delivery location is still nearly one mile from the Customs' port building. According to Duty Free, it is doubtful that someone with normal eyesight would be capable of observing transactions with specificity at that distance. In any case, Duty Free contends, there is no indication that Customs officials at the Port are even watching.

Finally, Duty Free challenges Customs' comparison of GNG's facility to its own duty-free enterprise. Duty Free contends any such comparison would be erroneous, as the two stores were approved for operation under different criteria.

Congress has not specified with certainty the exact relationship between an "actual exit" from a Customs territory and an "exit point." *See* 19 U.S.C. § 1555(b)(8)(F); *see also* S. Rep. No. 71 at 231 (noting exact procedures required to provide reasonable assurance of exportation depend on number of factors including location, and physical and geographical surroundings). "[E]xit point," rather, is loosely defined. Customs, as the administering agency, possesses the discretion to determine whether the distance between the point of delivery and entrance to the on-ramp permits feasible and utilized alternatives to exportation.

Duty Free has also failed to point to any significant differences between the regulatory standards in effect before the enactment of section 1555 and those imposed afterwards. The legislative history of the Omnibus Trade and Competitiveness Act of 1988 suggests such differences are negligible. *See* S. Rep. No. 71 at 233 (noting delivery methods at preexisting duty-free stores provided sufficient assurance of exportation). In fact, plaintiff claims standards imposed on stores before enactment of the statute may have been stricter. *(See* Pl.'s Mem. Supp. Summ. J. at 44) (citing directives prior to implementation of section 1555 defin-

ing "exit point" as point where failure of exportation is "practical impossibility").

It appears Congress had a different purpose in mind when enacting the Omnibus Trade and Competitiveness Act of 1988—to unify standards, not necessarily raise them. The Senate Report to the applicable provisions begins "this section would establish, for the first time, a comprehensive statutory framework for the regulation and operation of duty-free [stores]." S. Rep. No. 71 at 229. Consistent with the above language, and in light of the relative proximity and similarity of both facilities, Customs could properly compare the two duty-free enterprises in making its determination.

Customs compared GNG's application to Duty Free's facility and comparable location (the two facilities are less than 1/5th of a mile apart) and found GNG's existing delivery procedures and location provided reasonable assurance of exportation. *(See* Def.'s Mem. Opp'n Pl.'s Mtn. Summ. J., App., Mem. from Nat Aycox, Office of Cargo Enforcement and Facilitation, U.S. Customs Service, June 25, 1991, at 1) (noting delivery locations of the two duty-free facilities "are extremely close to each other and provide approximately the same degree of assurance that duty-free goods are exported").

Plaintiff's experience shows delivery near the entrance to I-87 virtually ensures exportation. Of a large number of sales made by Duty Free, very few instances were observed where duty-free merchandise was not exported from the United States. (Pl.'s Mem. Supp. Summ. J., Ex. F, Pl.'s Resps. to Def.'s First Interrogs., No. 5.) Indeed, duty-free merchandise was exported 99.989 percent of the time. *Id.*

Further, GNG's procedures reinforce exportation. GNG advises its customers on two separate occasions that the duty-free purchases are only for export to Canada: when the customer originally purchases the goods in GNG's facility, and when the cartman delivers the purchases. *(See* Pl.'s Mem. Supp. Summ. J., Ex. G, Letter from GNG to District Director of Customs, July 16, 1990.) Once delivery is made, the cartman observes the vehicle entering I-87. *Id.* It appears that the particular GNG employee delivering the merchandise to the vehicle is also responsible for monitoring the vehicle until it enters I-87, *id.*, thus the cartman knows which vehicles contain duty-free merchandise.

Although conditions may not always permit Customs to observe delivery and conduct spot checks, the court may not substitute its judgment for that of the agency in determining whether "any pattern of diversion by purchasers from immediate exportation would be readily apparent to Customs Officers at the port and investigated." Internal Advice Req. at 3. Further, the court will not supplant the agency's findings, merely by identifying alternative conclusions, even though the evidence may support more than one interpretation. *See Arkansas v. Oklahoma,* 112 S. Ct. 1046, 1060 (1992).

The court finds the totality of factors—(1) the nature and location of the delivery point; (2) the short distance between the delivery point and

the actual exit, permitting the cartman to monitor the vehicle until it enters the on-ramp; (3) the similarities with Duty Free's previously approved facility; and (4) GNG's delivery procedures—provide a reasonable basis for Customs' finding of a low probability that duty-free merchandise purchased from GNG would evade exportation.

2. *"Merchandise Storage Location":*

Besides delivery "at or beyond the exit point," 19 U.S.C. § 1555(b)(3)(F)(ii)(I), the statute further requires that a duty-free store deliver its merchandise "at a merchandise storage location." *Id.* Customs found that the cartman's vehicle used to transport duty-free merchandise to the delivery point was a "functional equivalent" of a mobile crib, and [fell] within the meaning of 'a merchandise storage location' as provided in the statute." HQ Reply at 6.

Duty Free challenges Customs' finding. According to Duty Free, a merchandise storage location, and similarly a crib, are facilities where merchandise is retained and stored for an extended period, rather than ones in which goods are merely transported and delivered. Duty Free further contends these facilities must be located beyond the exit point at delivery.

Duty Free does not contest that a crib may be a merchandise storage location. The regulations provide that a Class 9 warehouse with crib locations will be treated as a merchandise storage location. 19 C.F.R. § 19.35(c) (1994). Accordingly, a crib may also constitute such a location.

The court determines, therefore, whether GNG's delivery vehicle may be analogized to a "crib." Section 19.37(a), title 19, Code of Federal Regulations, defines "crib" as "a bonded area * * * for the retention of a small supply of articles for delivery to persons departing from the United States." 19 C.F.R. § 19.37(a) (1994). Further, a crib may be "a mobile facility * * * periodically moved * * * beyond the exit point." *Id.* GNG's cartman's vehicle falls into this definition, as it retains duty free merchandise for delivery. The regulations do not require retention of merchandise for an extended time, as Duty Free contends; temporary storage of merchandise during transfer to the duty-free purchaser is sufficient. The main inquiry in approving a merchandise storage location is the delivery location—whether it is at or beyond the exit point—rather than the delivery method. The court has already addressed and approved Customs' determination as to this issue.

Customs' interpretation of a cartman's vehicle as a merchandise storage location does not appear to frustrate the statutory purpose, nor is Customs' analogy of the cartman's vehicle to a crib unreasonable. Due to an agency's discretion in interpreting its own regulations, Customs' construction is permissible. *See generally Chevron,* 467 U.S. at 843.

CONCLUSION

Customs' approval of GNG's application to operate a duty-free store is upheld. The court finds Customs properly determined that there was no practical alternative to the exportation of duty-free merchandise from GNG's delivery location, and that Customs' finding of GNG's cart-

man's vehicle as a merchandise storage vehicle was proper. Plaintiff's motion for judgment on the agency record is denied; defendant's motion for judgment on the agency record is granted.

(Slip Op. 95–89)

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 92–09–00608

[Plaintiffs' motion for judgment on the agency record denied; action dismissed.]

(Decided May 12, 1995)

Weissman & Mintz (Gabrielle Semel) for the plaintiffs.
Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Cynthia B. Schultz);* and Office of the Solicitor, U.S. Department of Labor *(Scott Glabman),* of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* Subsequent to commencement of actions contesting denial by the U.S. Department of Labor of certification of eligibility for adjustment assistance under the Trade Act of 1974 for workers at the former Fine Chemical Division of The Upjohn Company in North Haven, Connecticut, the defendant inter-posed a motion in the one encaptioned above for remand to the Department "to conduct a further investigation, to consider additional data, and to make a redetermination whether petitioners are eligible for certification". The motion was granted, with the consent of plaintiffs' counsel.

I

The determination on remand, which was to affirm *Upjohn Co., North Haven, CT; Negative Determination Regarding Application for Reconsideration,* 57 Fed.Reg. 31,741 (July 17, 1992), and *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance; Negative Determinations; TA–W–26,999; Upjohn Co., North Haven, CT,* 57 Fed.Reg. 22,492 (May 28, 1992), describes the background of the action at bar as follows:

> The issue here involves a worker group which was initially certified under petition TA-W-24,041. The worker group produced several industrial chemicals[;] the largest component of production was dichlorobenzidine dihydro—DCB. As a consequence of the workers at North Haven not being separately identifiable by product, all the workers were certified because of increased imports of DCB.

All production of DCB at North Haven ceased in 1989; all production of industrial chemicals at North Haven ceased in 1990 or very early in 1991. As a consequence, the name of the North Haven facility was changed from the Fine Chemical Division of Upjohn Company to the North Haven Operations of the Upjohn Company.

Plaintiff states continuing worker separations after the expiration (April 11, 1992) of the statutory two-year certification period of TA-W-24,041. Plaintiff claims that the worker group should be recertified because the conditions are the same that justified the earlier certification. Plaintiff also claims that the Department should have used the same base year as it used in certifying the earlier petition because, but for Federal decommissioning requirements, all of the workers covered by the current petition would have been separated.

Given that section 231(1)(B) of the Trade Act does not permit the certification of workers laid off more than two years from the date of issue of a certification, the remaining more senior workers' only recourse for certification was to file a new petition—TA-W-26,999.

The plaintiff's claims for recertification are not valid for a number of reasons. First, the Department's investigation under petition (TA-W-26,999), shows that the workers were only producing intermediate pharmaceuticals, a different product from that for which the workers were previously certified. Further, these intermediate pharmaceuticals were integrated into the production of steroids at Upjohn's Kalamazoo, Michigan facility which was not under certification. Sales and production of intermediate pharmaceuticals at North Haven increased in 1992 compared to 1991 and remained steady in 1993. Employment on intermediate pharmaceuticals has remained steady in 1992 and in 1993.

Also, the remaining workers at North Haven, not producing intermediate pharmaceuticals, were engaged in decommissioning the plant. These findings would not provide a basis for using the same base year used in the certification of the North Haven worker group because the worker certification was based on increased imports of a different product—DCB, a textile dye, which was last produced in 1989.

Further, with respect to the Federal decommissioning requirements, the Department cannot take into account the layoffs that would have occurred had it not been for the new continued employment conditions created by the Federal decommissioning requirements. The requirements of other Federal laws do not provide a basis for relief under the Trade Act. Furthermore, the fact that the petitioning workers under TA-W-24,041 were retained to decommission the plant represents a management decision not to separate these workers at the time of the original petition[.] Consequently, the base year of the original petition cannot be used.

Certification under the Trade Act is not for everyone who is in some way affected by import competition but only for those whose separations which were caused importantly by increased imports of like or directly competitive articles with articles produced by the workers' firm and which contributed importantly to declines in sales or production and employment at the workers' firm.

58 Fed.Reg. 67,424 (Dec. 21, 1993).

The plaintiffs have responded to the foregoing determination with a motion pursuant to CIT Rule 56.1 for judgment on the agency record, asserting that it is arbitrary and capricious. They argue, among other things, that the workers laid off after April 11, 1992 satisfy all three statutory criteria for certification, that they present "reasons that are both rational and compelling to deviate from the regulatory base period"[1] and that the defendant has ignored "the congressionally mandated mood of 'largesse' required in the granting of trade assistance"[2].

Plaintiffs' motion is formulated as if within the ambit of the Administrative Procedure Act, which provides that a court hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law[3], but this court's exclusive jurisdiction over this action is derived from the Customs Courts Act of 1980[4], with the scope of review restricted by that statute to determining if the findings of fact by the Secretary of Labor are supported by substantial evidence on the record. 19 U.S.C. § 2395(b). *See generally United Elec., Radio and Machine Workers of America v. Brock*, 14 CIT 121, 731 F.Supp. 1082 (1990). *Cf.* Trade Act of 1974, Pub.L. No. 93–618, § 250, 88 Stat. 1978, 2029–30 (1975).

II

That part of the Trade Act which governed the Department of Labor's Employment and Training Administration and its Office of Trade Adjustment Assistance ("OTAA") in resolving the petition for certification (and now this appeal) provided that

> (a) The Secretary * * * certify a group of workers * * * as eligible to apply for adjustment assistance * * * if he determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

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[1] Plaintiffs' Reply Memorandum, p. 3.

[2] *Id.*

[3] 5 U.S.C. § 706(2)(A).

[4] 28 U.S.C. § 1581(d)(1).

(b) For purposes of subsection (a)(3) of this section—

(1) The term "contributed importantly" means a cause which is important but not necessarily more important than any other cause * * *.

19 U.S.C. § 2272 (1992).

As indicated by the above recitation on remand, in 1990 OTAA issued an affirmative determination pursuant to 19 U.S.C. § 2273 for all workers separated from Upjohn's North Haven Fine Chemical Division on or after January 5, 1989[5], the year when production of DCB was terminated. That is, the agency found the increased imports of that chemical satisfied the foregoing requirements of section 2272—subject, of course, to the Trade Act's period of limitation, to wit:

(a) Trade readjustment allowance conditions

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification * * * who files an application for such allowance for any week of unemployment which begins more than 60 days after the date on which the petition that resulted in such certification was filed * * *, if the following conditions are met:

(1) Such worker's total or partial separation before his application under this part occurred—

(A) on or after the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment,

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 of this title was made, and

(C) before the termination date (if any) determined pursuant to section 2273(d) of this title.

19 U.S.C. § 2291(a) (1990).

A

To the extent plaintiffs' motion is premised upon extension of that statute of limitation, neither the Department of Labor nor the Court of International Trade is at liberty to fashion such relief. Only Congress can. And only the legislature can amend the requirements regarding separation during the prescribed period for receipt of assistance.

B

Those individuals continuing to work at the North Haven facility in 1992 were advised to file a new petition, No. TA-W-26,999, the administrative disposition of which is now properly before the court for review. OTAA commenced an investigation of the circumstances then in existence and found that they did not meet the requirements of 19 U.S.C. § 2272(a)(3), *supra,* for assistance. The negative determination found that Upjohn's production of chemicals other than DCB had been inte-

[5] *See* 55 Fed.Reg. 17,837, 17,838 (April 27, 1990); 58 Fed.Reg. at 67,424, *supra.*

grated into its operations elsewhere. *See* Public Record ("PubRec") at 40. Upon further consideration, the agency added:

> * * * [W]orkers at North Haven may be certified for TAA only if their separations were caused importantly by a reduced demand for their production from a corporately-affiliated manufacturing facility whose workers independently meet the statutory criteria for certification. These conditions have not been met for workers producing intermediate pharmaceutical products at North Haven.
>
> The only other activity at North Haven is the decommissioning of the facility. This activity would not form a basis for a worker group certification. Also, the fact that there is not sufficient work remaining at the facility to warrant its remaining in operation would not form a basis for a certification.

Id. at 91. In other words, OTAA concluded anew that 19 U.S.C. § 2272(a)(3) was not satisfied.

Substantial evidence has been held to be that which reasonably supports a finding. *E.g.*, *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F.Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed.Cir. 1987). The record developed in regard to plaintiffs' petition clearly reflects such evidence in support of the determination of the agency after remand. *See, e.g.*, PubRec at 16–18 (OTAA Investigative Report); Confidential Record at 19–37 (data collection forms submitted by Upjohn). In short, as correctly pointed out in that determination, certification under the Trade Act of 1974 is not for everyone who is affected in some way by import competition but only for individuals whose separations from work are caused importantly by increased imports of like or directly competitive matter with that produced by the workers' firm and which imports contribute importantly to declines in sales or production and employment at that firm. Judgment must therefore now enter in favor of the defendant.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/42 5/8/95 Aquilino, J.	Erika Inc.	92-01-00012	9018.90.70203 4/2%	9817.00.96 Duty free	Agreed statement of facts	Newark and Kennedy Intl Airport Dialyzers for hemodialysis
C95/43 5/10/95 Musgrave, J.	Erika Inc.	93-09-00644	9018.39.00 4.2%	9817.00.96 Duty free	Travenol Laboratories, Inc. *v.* United States, 17 CIT 69, 813 F. Supp. 844	Los Angeles fistula needle sets for hemodialysis
C95/44 5/10/95 Musgrave, J.	Gates-Mills, Inc.	94-09-00553, etc.	6216.00.32 14%	6216.00.46 5.5%	Agreed statement of facts	New York "Hunting gloves" and "men's ski gloves"
C95/45 5/10/95 Musgrave, J.	Trek Bicycle	92-06-00386	8712.00.35 11.0%	8712.00.35 5.5%	Agreed statement of facts	Port of Los Angeles Bicycles Trek model 700 and 720

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